UNITED STATES REPORTS

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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2005

JUNE 22 THROUGH SEPTEMBER 28, 2006

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

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Errata

546 U. S. 1017, No. 05–6219: "161 S. W. 3d" should be "163 S. W. 3d".
546 U. S. 1093, No. 05–573: "413 F. 3d" should be "410 F. 3d".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

JOHN G. ROBERTS, JR., CHIEF JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
STEPHEN BREYER, ASSOCIATE JUSTICE.
SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE.

RETIRED

SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective February 1, 2006, viz.:

For the District of Columbia Circuit, JOHN G. ROBERTS, JR., Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, JOHN G. ROBERTS, JR., Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, SAMUEL A. ALITO, JR., Associate Justice.

For the Ninth Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Tenth Circuit, STEPHEN BREYER, Associate Justice.

For the Eleventh Circuit, CLARENCE THOMAS, Associate Justice.

For the Federal Circuit, JOHN G. ROBERTS, JR., Chief Justice.

February 1, 2006.

(For next previous allotment, see 546 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2005

DIXON *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05–7053. Argued April 25, 2006—Decided June 22, 2006

Petitioner was charged with receiving a firearm while under indictment in violation of 18 U. S. C. § 922(n) and with making false statements in connection with the acquisition of a firearm in violation of § 922(a)(6). She admitted at trial that she knew she was under indictment when she purchased the firearms and knew that doing so was a crime, but claimed that she was acting under duress because her boyfriend had threatened to harm her and her daughters if she did not buy the guns for him. Bound by Fifth Circuit precedent, the District Court declined her request for a jury instruction placing upon the Government the burden to disprove, beyond a reasonable doubt, her duress defense. Instead, the jury was instructed that petitioner had the burden to establish her defense by a preponderance of the evidence. She was convicted, and the Fifth Circuit affirmed.

Held:

1. The jury instructions did not run afoul of the Due Process Clause. The crimes of conviction require that petitioner have acted "knowingly," § 922(a)(6)—which "merely requires proof of knowledge of the facts that constitute the offense," *Bryan* v. *United States*, 524 U. S. 184, 193—or "willfully," § 924(a)(1)(D)—which requires acting "with knowledge that [the] conduct was unlawful," *ibid.* Thus, the Government bore the burden of proving beyond a reasonable doubt that petitioner knew that she was making false statements and knew that she was breaking the law when she acquired a firearm while under indictment. It clearly met its

burden when petitioner testified to that effect. Petitioner contends that she cannot have formed the necessary *mens rea* because she did not freely choose to commit the crimes. However, while the duress defense may excuse conduct that would otherwise be punishable, see *United States* v. *Bailey*, 444 U. S. 394, 409–410, the existence of duress normally does not controvert any of the elements of the offense itself. The fact that petitioner's crimes are statutory offenses with no counterpart in the common law supports this conclusion. The jury instructions were consistent with the requirement that the Government prove the mental states specified in §§ 922(a)(6) and 924(a)(1)(D) and did not run afoul of due process by placing the burden on petitioner to establish duress by a preponderance of the evidence. Pp. 5–8.

2. Modern common law does not require the Government to bear the burden of disproving petitioner's duress defense beyond a reasonable doubt. The long-established common-law rule, which places the burden of proving that defense on the defendant, was not upset by *Davis* v. *United States*, 160 U. S. 469. There, the Court interpreted a defendant's insanity to controvert the necessary *mens rea* for a murder committed "feloniously, wilfully, and of his malice aforethought," *id.*, at 474, and required the Government to prove the defendant's sanity beyond a reasonable doubt because the evidence tending to prove insanity also tended to disprove an essential element of the offense. The duress evidence that petitioner adduced at trial does not contradict or tend to disprove any element of her statutory offenses. She is also not helped by the resulting "*Davis* rule," which was not constitutionally mandated, and which Congress overruled by statute, requiring a defendant to prove insanity by clear and convincing evidence.

Petitioner's reliance on *Davis* also ignores the fact that federal crimes are "solely creatures of statute," *Liparota* v. *United States*, 471 U. S. 419, 424, and thus the Court must effectuate the duress defense as Congress "may have contemplated" it in the context of these specific offenses, *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U. S. 483, 490, n. 3. The Court can assume that, when passing the relevant 1968 Act, Congress was familiar with the long-established common-law rule and the rule of *McKelvey* v. *United States*, 260 U. S. 353, 357—that the one relying on an affirmative defense must set it up and establish it—and would have expected federal courts to apply a similar approach to any affirmative defense or excuse for violating the new law. To accept petitioner's contrary hypothesis that *Davis* dramatically upset well-settled law would require an overwhelming consensus among federal courts placing the burden on the Government, but conflict among the Circuits demonstrates that such consensus has never existed. For a similar reason, no weight is due the 1962 Model Penal

Code. There is no evidence that Congress endorsed the Code's views or incorporated them into the 1968 Act. In fact, when Congress amended the Act to add a *mens rea* requirement, it punished "willful" violations, a mental state not embraced by the Code. Effectuating the affirmative defense as Congress may have contemplated it, the Court presumes that, in the context of the firearms offenses here and the long-established common-law rule, Congress intended petitioner to bear the burden of proving the duress defense by a preponderance of the evidence. Pp. 8–17.

413 F. 3d 520, affirmed.

STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, GINSBURG, and ALITO, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 17. ALITO, J., filed a concurring opinion, in which SCALIA, J., joined, *post*, p. 19. BREYER, J., filed a dissenting opinion, in which SOUTER, J., joined, *post*, p. 20.

J. Craig Jett, by appointment of the Court, 547 U. S. 1002, argued the cause for petitioner. With him on the briefs was *Jeffrey T. Green*.

Irving L. Gornstein argued the cause for the United States. On the brief were *Solicitor General Clement*, *Assistant Attorney General Fisher*, *Deputy Solicitor General Dreeben*, *Deanne E. Maynard*, and *Deborah Watson*.*

JUSTICE STEVENS delivered the opinion of the Court.

In January 2003, petitioner Keshia Dixon purchased multiple firearms at two gun shows, during the course of which she provided an incorrect address and falsely stated that she was not under indictment for a felony. As a result of these illegal acts, petitioner was indicted and convicted on one count of receiving a firearm while under indictment in violation of 18 U. S. C. § 922(n) and eight counts of making false statements in connection with the acquisition of a firearm in violation of § 922(a)(6). At trial, petitioner admitted that

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**Elliot H. Scherker*, *Julissa Rodriguez*, *Karen M. Gottlieb*, *Peter Goldberger*, and *Pamela Harris* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

she knew she was under indictment when she made the purchases and that she knew doing so was a crime; her defense was that she acted under duress because her boyfriend threatened to kill her or hurt her daughters if she did not buy the guns for him.

Petitioner contends that the trial judge's instructions to the jury erroneously required her to prove duress by a preponderance of the evidence instead of requiring the Government to prove beyond a reasonable doubt that she did not act under duress. The Court of Appeals rejected petitioner's contention, 413 F. 3d 520 (CA5 2005); given contrary treatment of the issue by other federal courts,[1] we granted certiorari, 546 U. S. 1135 (2006).

I

At trial, in her request for jury instructions on her defense of duress, petitioner contended that she "should have the burden of production, and then that the Government should be required to disprove beyond a reasonable doubt the duress." App. 300. Petitioner admitted that this request was contrary to Fifth Circuit precedent, and the trial court, correctly finding itself bound by Circuit precedent, denied petitioner's request. *Ibid.* Instead, the judge's instructions to the jury defined the elements of the duress defense[2] and

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[1] Cf., *e. g.*, *United States* v. *Talbott*, 78 F. 3d 1183, 1186 (CA7 1996) *(per curiam)*; *United States* v. *Riffe*, 28 F. 3d 565, 568, n. 2 (CA6 1994); *United States* v. *Simpson*, 979 F. 2d 1282, 1287 (CA8 1992).

[2] There is no federal statute defining the elements of the duress defense. We have not specified the elements of the defense, see, *e. g.*, *United States* v. *Bailey*, 444 U. S. 394, 409–410 (1980), and need not do so today. Instead, we presume the accuracy of the District Court's description of these elements: (1) The defendant was under an unlawful and imminent threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury; (2) the defendant had not recklessly or negligently placed herself in a situation in which it was probable that she would be forced to perform the criminal conduct; (3) the defendant had no reasonable, legal alternative to violating the law, that is, a chance both to refuse to perform the criminal act and also to avoid the threatened harm; and,

stated that petitioner has "the burden of proof to establish the defense of duress by a preponderance of the evidence." *Id.*, at 312.

Petitioner argues here, as she did in the District Court and the Court of Appeals, that federal law requires the Government to bear the burden of disproving her defense beyond a reasonable doubt and that the trial court's erroneous instruction on this point entitles her to a new trial. There are two aspects to petitioner's argument in support of her proposed instruction that merit separate discussion. First, petitioner contends that her defense "controverted the *mens rea* required for conviction" and therefore that the Due Process Clause requires the Government to retain the burden of persuasion on that element. Brief for Petitioner 41. Second, petitioner argues that the Fifth Circuit's rule is "contrary to modern common law." *Id.*, at 14.

II

The crimes for which petitioner was convicted require that she have acted "knowingly," § 922(a)(6), or "willfully," § 924(a)(1)(D).[3] As we have explained, "unless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." *Bryan* v. *United States*, 524 U. S. 184, 193 (1998) (footnote omitted). And the term "willfully" in § 924(a)(1)(D) requires a defendant to have "acted with knowledge that his conduct was unlawful." *Ibid.* In this case, then, the Government bore the burden of proving beyond a reasonable doubt that petitioner knew she was mak-

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(4) that a direct causal relationship may be reasonably anticipated between the criminal act and the avoidance of the threatened harm. See App. 312–313; see generally *United States* v. *Harper*, 802 F. 2d 115, 118 (CA5 1986).

[3] Although § 922(n) does not contain a *mens rea* requirement, the relevant sentencing provision, § 924(a)(1)(D), requires that a violation be committed willfully.

ing false statements in connection with the acquisition of firearms and that she knew she was breaking the law when she acquired a firearm while under indictment. See *In re Winship*, 397 U. S. 358, 364 (1970). Although the Government may have proved these elements in other ways, it clearly met its burden when petitioner testified that she knowingly committed certain acts—she put a false address on the forms she completed to purchase the firearms, falsely claimed that she was the actual buyer of the firearms, and falsely stated that she was not under indictment at the time of the purchase—and when she testified that she knew she was breaking the law when, as an individual under indictment at the time, she purchased a firearm. App. 221–222.

Petitioner contends, however, that she cannot have formed the necessary *mens rea* for these crimes because she did not freely choose to commit the acts in question. But even if we assume that petitioner's will was overborne by the threats made against her and her daughters, she still *knew* that she was making false statements and *knew* that she was breaking the law by buying a firearm. The duress defense, like the defense of necessity that we considered in *United States* v. *Bailey*, 444 U. S. 394, 409–410 (1980), may excuse conduct that would otherwise be punishable, but the existence of duress normally does not controvert any of the elements of the offense itself.[4] As we explained in *Bailey*, "[c]riminal liability is normally based upon the concurrence of two factors, 'an evil-meaning mind [and] and evil-doing hand . . . .'" *Id.*, at 402 (quoting *Morissette* v. *United States*,

[4] As the Government recognized at oral argument, there may be crimes where the nature of the *mens rea* would require the Government to disprove the existence of duress beyond a reasonable doubt. See Tr. of Oral Arg. 26–27; see also, *e. g.*, 1 W. LaFave, Substantive Criminal Law § 5.1, p. 333 (2d ed. 2003) (hereinafter LaFave) (explaining that some common-law crimes require that the crime be done "'maliciously'"); Black's Law Dictionary 968 (7th ed. 1999) (defining malice as "[t]he intent, without justification or excuse, to commit a wrongful act").

342 U. S. 246, 251 (1952)). Like the defense of necessity, the defense of duress does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully; instead, it allows the defendant to "avoid liability . . . because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present." *Bailey*, 444 U. S., at 402.[5]

The fact that petitioner's crimes are statutory offenses that have no counterpart in the common law also supports our conclusion that her duress defense in no way disproves an element of those crimes. We have observed that "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota* v. *United States*, 471 U. S. 419, 424 (1985). Here, consistent with the movement away from the traditional dichotomy of general versus specific intent and toward a more specifically defined hierarchy of culpable mental states, see *Bailey*, 444 U. S., at 403–404, Congress defined the crimes at issue to punish defendants who act "knowingly," § 922(a)(6), or "willfully," § 924(a)(1)(D). It is these specific mental states, rather than some vague "evil mind," Brief for Petitioner 42, or "'criminal' intent," *Martin* v. *Ohio*, 480 U. S. 228, 235 (1987), that the Government is required to prove beyond a reasonable doubt, see *Patterson* v. *New York*, 432 U. S. 197, 211, n. 12 (1977) ("The applicability of the reasonable-doubt standard,

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[5] Professor LaFave has explained the duress defense as follows:

"The rationale of the defense is not that the defendant, faced with the unnerving threat of harm unless he does an act which violates the literal language of the criminal law, somehow loses his mental capacity to commit the crime in question. Nor is it that the defendant has not engaged in a voluntary act. Rather it is that, even though he has done the act the crime requires and has the mental state which the crime requires, his conduct which violates the literal language of the criminal law is excused . . . ." 2 LaFave § 9.7(a), at 73 (footnotes omitted).

however, has always been dependent on how a State defines the offense that is charged in any given case"). The jury instructions in this case were consistent with this requirement and, as such, did not run afoul of the Due Process Clause when they placed the burden on petitioner to establish the existence of duress by a preponderance of the evidence.

III

Having found no constitutional basis for placing upon the Government the burden of disproving petitioner's duress defense beyond a reasonable doubt, we next address petitioner's argument that the modern common law requires the Government to bear that burden. In making this argument, petitioner recognizes that, until the end of the 19th century, common-law courts generally adhered to the rule that "the proponent of an issue bears the burden of persuasion on the factual premises for applying the rule." Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 Yale L. J. 880, 898 (1967–1968). In petitioner's view, however, two important developments have established a contrary common-law rule that now prevails in federal courts: this Court's decision in *Davis* v. *United States*, 160 U. S. 469 (1895), which placed the burden on the Government to prove a defendant's sanity, and the publication of the Model Penal Code in 1962.

Although undisputed in this case, it bears repeating that, at common law, the burden of proving "affirmative defenses—indeed, 'all . . . circumstances of justification, excuse or alleviation'—rested on the defendant." *Patterson*, 432 U. S., at 202 (quoting 4 W. Blackstone, Commentaries *201); see also *Martin* v. *Ohio*, 480 U. S., at 235; *Mullaney* v. *Wilbur*, 421 U. S. 684, 693 (1975). This common-law rule accords with the general evidentiary rule that "the burdens of producing evidence and of persuasion with regard to any given issue are both generally allocated to the same party." 2 J. Strong, McCormick on Evidence § 337, p. 415 (5th ed.

1999). And, in the context of the defense of duress, it accords with the doctrine that "where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue." *Id.*, at 413. Although she claims that the common-law rule placing the burden on a defendant to prove the existence of duress "was the product of flawed reasoning," petitioner accepts that this was the general rule, at least until this Court's decision in *Davis*. Brief for Petitioner 18. According to petitioner, however, *Davis* initiated a revolution that overthrew the old common-law rule and established her proposed rule in its place.

Davis itself, however, does not support petitioner's position. In that case, we reviewed a defendant's conviction for having committed murder "feloniously, wilfully, and of his malice aforethought." 160 U. S., at 474. It was undisputed that the prosecution's evidence, "if alone considered, made it the duty of the jury to return a verdict of guilty of the crime charged"; the defendant, however, adduced evidence at trial tending to show that he did not have the mental capacity to form the requisite intent. *Id.*, at 475. At issue before the Court was the correctness of the trial judge's instruction to the jury that the law "'presumes every man is sane, and the burden of showing it is not true is upon the party who asserts it.'" *Id.*, at 476. Under this instruction, "if the evidence was *in equilibrio* as to the accused being sane, that is, capable of comprehending the nature and effect of his acts, he was to be treated just as he would be if there were no defence of insanity or if there were an entire absence of proof that he was insane." *Id.*, at 479.

In reversing the defendant's conviction, we found ourselves "unable to assent to the doctrine that *in a prosecution for murder* . . . it is the duty of the jury to convict where the evidence is equally balanced on the issue as to the sanity of the accused at the time of the killing." *Id.*, at 484 (emphasis added). Instead, we concluded that this defendant was "entitled to an acquittal of *the specific crime charged* if upon

all the evidence there is reasonable doubt whether he was capable in law of committing [the] crime." *Ibid.* (emphasis added). Our opinion focused on the "definition of murder," explaining that "it is of the very essence of that heinous crime that it be committed by a person of 'sound memory and discretion,' and with 'malice aforethought.'" *Ibid.* Reviewing "the adjudged cases" and "elementary treatises upon criminal law," we found that "[a]ll admit that the crime of murder necessarily involves the possession by the accused of such mental capacity as will render him criminally responsible for his acts." *Id.*, at 485. Thus, when we ultimately found that the burden of proving the accused's sanity rested on the Government, our holding rested on the conclusion that

> "[Davis'] guilt cannot be said to have been proved beyond a reasonable doubt—his will and his acts cannot be held to have joined in perpetrating the murder charged—if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or (which is the same thing) whether he wilfully, deliberately, unlawfully, and of malice aforethought took the life of the deceased. As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible, criminally, for his acts. How then upon principle or consistently with humanity can a verdict of guilty be properly returned, if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime?" *Id.*, at 488.

Our opinion in *Davis*, then, interpreted a defendant's sanity to controvert the necessary *mens rea* for the crime of

murder committed "feloniously, wilfully, and of his malice aforethought," *id.*, at 474, as "[o]ne who takes human life cannot be said to be actuated by malice aforethought, or to have deliberately intended to take life, or to have 'a wicked, depraved, and malignant heart,' . . . unless at the time he had sufficient mind to comprehend the criminality or the right and wrong of such an act," *id.*, at 485. We required the Government to prove the defendant's sanity beyond a reasonable doubt because the evidence that tended to prove insanity also tended to disprove an essential element of the offense charged. See *Davis* v. *United States*, 165 U. S. 373, 378 (1897) ("[T]he fact of sanity, *as any other essential fact in the case*, must be established to the satisfaction of the jury beyond a reasonable doubt" (emphasis added)). Whether or not this reasoning correctly treated insanity as negating the *mens rea* for murder as defined in the statute at issue, cf. n. 4, *supra*, it does not help petitioner: The evidence of duress she adduced at trial does not contradict or tend to disprove any element of the statutory offenses that she committed.

Nor does the proposition for which *Davis* has come to stand help petitioner's cause. Although written more narrowly in the context of a prosecution for the crime of murder, *Davis* was later interpreted to establish a general "rule for federal prosecutions . . . that an accused is 'entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime.'" *Leland* v. *Oregon*, 343 U. S. 790, 797 (1952) (quoting *Davis*, 160 U. S., at 484); see also *Lynch* v. *Overholser*, 369 U. S. 705, 713 (1962) (explaining that the *Davis* rule applied in all federal courts). After *Davis*, if a federal defendant introduced sufficient evidence to raise a reasonable doubt as to his sanity, it was sufficient to create a question for the jury on which the Government bore the ultimate burden of persuasion beyond a reasonable doubt.

See, *e. g.*, *Hall* v. *United States*, 295 F. 2d 26, 28 (CA4 1961); *Holloway* v. *United States*, 148 F. 2d 665, 666 (CADC 1945); *Post* v. *United States*, 135 F. 1, 10 (CA5 1905).

In apparent recognition of the fact that *Davis* relied on the heightened *mens rea* applicable to the particular statute at issue, we held in *Leland* that this rule was not constitutionally mandated, 343 U. S., at 797, and Congress overruled it by statute in 1984, requiring a defendant to prove his insanity by clear and convincing evidence, 98 Stat. 2057, codified at 18 U. S. C. § 17(b). Moreover, Congress has treated the defense of insanity differently from that of duress not only by codifying it but by requiring defendants who intend to rely on an insanity defense to provide advance notice to the Government. See Fed. Rule Crim. Proc. 12.2(a). Thus, even if the rule arising from *Davis* may have once been relevant to an evaluation of other affirmative defenses, Congress' differential treatment of the insanity defense and its rejection of the *Davis* rule are inconsistent with petitioner's invitation to follow *Davis*' lead in this case.

Indeed, petitioner's reliance on *Davis* ignores the fact that federal crimes "are solely creatures of statute," *Liparota*, 471 U. S., at 424, and therefore that we are required to effectuate the duress defense as Congress "may have contemplated" it in the context of these specific offenses, *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U. S. 483, 491, n. 3 (2001) (internal quotation marks omitted); see also *id.*, at 499 (STEVENS, J., concurring in judgment) (explaining that Court was addressing whether the statute at issue foreclosed a necessity defense to specific charges brought under the statute); *Bailey*, 444 U. S., at 410 ("We need not speculate now, however, on the precise contours of whatever defenses of duress or necessity are available against charges brought under [18 U. S. C.] § 751(a)"). The offenses at issue in this case were created by statute in 1968, when Congress enacted the Omnibus Crime Control and Safe Streets Act (hereinafter Safe Streets Act or Act). See 82

Stat. 197. There is no evidence in the Act's structure or history that Congress actually considered the question of how the duress defense should work in this context, and there is no suggestion that the offenses at issue are incompatible with a defense of duress.[6] Cf. *Oakland Cannabis Buyers' Cooperative*, 532 U. S., at 491. Assuming that a defense of duress is available to the statutory crimes at issue,[7] then, we must determine what that defense would look like as Congress "may have contemplated" it.

As discussed above, the common law long required the defendant to bear the burden of proving the existence of duress. Similarly, even where Congress has enacted an affirmative defense in the proviso of a statute, the "settled rule in this jurisdiction [is] that an indictment or other pleading . . . need not negative the matter of an exception made by a proviso or other distinct clause . . . and that it is incumbent on one who relies on such an exception to set it up and establish it." *McKelvey* v. *United States*, 260 U. S. 353, 357 (1922); see also *United States* v. *Dickson*, 15 Pet. 141, 165 (1841) (calling this "the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes"). Even though the Safe Streets Act does not mention the defense of duress, we can safely assume that the 1968 Congress was familiar with

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[6] While Congress' findings in support of the Safe Streets Act show that Congress was concerned because "the ease with which any person can acquire firearms . . . is a significant factor in the prevalence of lawlessness and violent crime in the United States," § 901(a)(2), 82 Stat. 225, it would be unrealistic to read this concern with the proliferation of firearm-based violent crime as implicitly doing away with a defense as strongly rooted in history as the duress defense, see, *e. g.*, 4 W. Blackstone, Commentaries on the Laws of England 30 (1769).

[7] We have previously made this assumption when addressing common-law affirmative defenses, see *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U. S. 483, 491 (2001); *Bailey*, 444 U. S., at 410, and the parties give us no reason to question it here.

both the long-established common-law rule[8] and the rule applied in *McKelvey* and that it would have expected federal courts to apply a similar approach to any affirmative defense that might be asserted as a justification or excuse for violating the new law.[9]

This conclusion is surely more reasonable than petitioner's hypothesis that *Davis* dramatically upset a well-settled rule of law. Petitioner cites only one federal case decided before 1968 for the proposition that it has been well established in federal law that the Government bears the burden of disproving duress beyond a reasonable doubt. But that case involved a defendant's claim that he "lacked the specific intent to defraud required by the statute for the reason that he committed the offense under duress and coercion." *Johnson* v. *United States*, 291 F. 2d 150, 152 (CA8 1961). Thus, when the Court of Appeals explained that "there is no burden upon the defendant to prove his defense of coercion," *id.*, at 155, that statement is best understood in context as a corollary to the by-then-unremarkable proposition that "the burden of proof rests upon the Government to prove the defendant's guilt beyond a reasonable doubt," *ibid.* Properly understood, *Johnson* provides petitioner little help in her uphill struggle to prove that a dramatic shift in the federal common-law rule occurred between *Davis* and the enactment of the Safe Streets Act in 1968.

Indeed, for us to be able to accept petitioner's proposition, we would need to find an overwhelming consensus among

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[8] Indeed, when a congressional committee did consider codifying the duress defense, it would have had the courts determine the defense "according to the principles of the common law as they may be interpreted in the light of reason and experience." S. 1437, 95th Cong., 2d Sess., § 501 (1978).

[9] Duress, like the defense at issue in *McKelvey*, is an excuse that allows an exception from liability. See, *e. g.*, 2 LaFave § 9.7, at 72 ("The rationale of the defense of duress is that the defendant ought to be excused when he 'is the victim of a threat that a person of reasonable moral strength could not fairly be expected to resist'").

federal courts that it is the Government's burden to disprove the existence of duress beyond a reasonable doubt. The existence today of disagreement among the Federal Courts of Appeals on this issue, however—the very disagreement that caused us to grant certiorari in this case, see n. 1, *supra*—demonstrates that no such consensus has ever existed. See also *post*, at 25–27 (BREYER, J., dissenting) (discussing differences in treatment of the duress defense by the various Courts of Appeals). Also undermining petitioner's argument is the fact that, in 1970, the National Commission on Reform of Federal Criminal Laws proposed that a defendant prove the existence of duress by a preponderance of the evidence. See 1 Working Papers 278. Moreover, while there seem to be few, if any, post-*Davis*, pre-1968 cases placing the burden on a defendant to prove the existence of duress,[10] or even discussing the issue in any way, this lack of evidence does not help petitioner. The long-established common-law rule is that the burden of proving duress rests on the defendant. Petitioner hypothesizes that *Davis* fomented a revolution upsetting this rule. If this were true, one would expect to find cases discussing the matter. But no such cases exist.

It is for a similar reason that we give no weight to the publication of the Model Penal Code in 1962. As petitioner notes, the Code would place the burden on the government to disprove the existence of duress beyond a reasonable doubt. See ALI, Model Penal Code § 1.12, p. 88 (2001) (hereinafter Model Penal Code or Code) (stating that each element

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[10] In *D'Aquino* v. *United States*, 192 F. 2d 338, 358, n. 11 (CA9 1951), the trial court instructed the jury that it would be warranted in acquitting the defendant on the basis that she acted under duress "'[i]f you believe from the evidence that the defendant committed these acts that the Government alleges . . . under a well grounded apprehension of immediate death or serious bodily injury . . . .'" This instruction did not require the Government to disprove duress beyond a reasonable doubt, and it seemingly placed the burden on the defendant to prove the existence of duress.

of an offense must be proved beyond a reasonable doubt); § 1.13(9)(c), at 91 (defining as an element anything that negatives an excuse for the conduct at issue); § 2.09, at 131–132 (establishing affirmative defense of duress). Petitioner argues that the Code reflects "well established" federal law as it existed at the time. Brief for Petitioner 25. But, as discussed above, no such consensus existed when Congress passed the Safe Streets Act in 1968. And even if we assume Congress' familiarity with the Code and the rule it would establish, there is no evidence that Congress endorsed the Code's views or incorporated them into the Safe Streets Act.

In fact, the Act itself provides evidence to the contrary. Despite the Code's careful delineation of mental states, see Model Penal Code § 2.02, at 94–95, the Safe Streets Act attached no explicit *mens rea* requirement to the crime of receiving a firearm while under indictment, § 924(a), 82 Stat. 233 ("Whoever violates any provision of this chapter . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both"). And when Congress amended the Act to impose a *mens rea* requirement, it punished people who "willfully" violate the statute, see §104(a), 100 Stat. 456, a mental state that has not been embraced by the Code, see Model Penal Code § 2.02(2), at 94–95 (defining "purposely," "knowingly," "recklessly," and "negligently"); *id.*, Explanatory Note, at 97 ("Though the term 'wilfully' is not used in the definitions of crimes contained in the Code, its currency and its existence in offenses outside the criminal code suggest the desirability of clarification"). Had Congress intended to adopt the Code's structure when it enacted or amended the Safe Streets Act, one would expect the Act's form and language to adhere much more closely to that used by the Code. It does not, and, for that reason, we cannot rely on the Model Penal Code to provide evidence as to how Congress would have wanted us to effectuate the duress defense in this context.

IV

Congress can, if it chooses, enact a duress defense that places the burden on the Government to disprove duress beyond a reasonable doubt. In light of Congress' silence on the issue, however, it is up to the federal courts to effectuate the affirmative defense of duress as Congress "may have contemplated" it in an offense-specific context. *Oakland Cannabis Buyers' Cooperative*, 532 U. S., at 491, n. 3 (internal quotation marks omitted). In the context of the firearms offenses at issue—as will usually be the case, given the long-established common-law rule—we presume that Congress intended the petitioner to bear the burden of proving the defense of duress by a preponderance of the evidence. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE KENNEDY, concurring.

No one disputes that, subject to constitutional constraints, Congress has the authority to determine the content of a duress defense with respect to federal crimes and to direct whether the burden of proof rests with the defense or the prosecution. The question here is how to proceed when Congress has enacted a criminal statute, the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197 *et seq.* (hereinafter Safe Streets Act), without explicit instructions regarding the duress defense or its burden of proof. See *ante*, at 12–13.

When issues of congressional intent with respect to the nature, extent, and definition of federal crimes arise, we assume Congress acted against certain background understandings set forth in judicial decisions in the Anglo-American legal tradition. See *United States* v. *Bailey*, 444 U. S. 394, 415, n. 11 (1980). Those decisions, in turn, consult sources such as legal treatises and the American Legal Insti-

tute's Model Penal Code. See, *e. g.*, *United States* v. *Jimenez Recio*, 537 U. S. 270, 275–276 (2003); *Salinas* v. *United States*, 522 U. S. 52, 64–65 (1997). All of these sources rely upon the insight gained over time as the legal process continues. Absent some contrary indication in the statute, we can assume that Congress would not want to foreclose the courts from consulting these newer sources and considering innovative arguments in resolving issues not confronted in the statute and not within the likely purview of Congress when it enacted the criminal prohibition applicable in the particular case.

While the Court looks to the state of the law at the time the statute was enacted, see *ante*, at 14, the better reading of the Court's opinion is that isolated authorities or writings do not control unless they were indicative of guiding principles upon which Congress likely would have relied. Otherwise, it seems altogether a fiction to attribute to Congress any intent one way or the other in assigning the burden of proof. It seems unlikely, moreover, that Congress would have wanted the burden of proof for duress to vary from statute to statute depending upon the date of enactment. Consistent with these propositions, the Court looks not only to our precedents and common-law traditions, but also to the treatment of the insanity defense in a 1984 statute and a proposal of the National Commission on Reform of Federal Criminal Laws, even though they both postdated the passage of the Safe Streets Act. See *ante*, at 12, 15.

As there is no reason to suppose that Congress wanted to depart from the traditional principles for allocating the burden of proof, the proper approach is simply to apply these principles to the context of duress. See, *e. g.*, *Schaffer* v. *Weast*, 546 U. S. 49, 56 (2005) (where the plain text of the statute is "silent on the allocation of the burden of persuasion," we proceed to consider the "ordinary default rule" and its exceptions). The facts needed to prove or disprove the defense "lie peculiarly in the knowledge of" the defendant.

2 K. Broun, McCormick on Evidence § 337, p. 475 (6th ed. 2006); see *ante*, at 8–9. The claim of duress in most instances depends upon conduct that takes place before the criminal act; and, as the person who allegedly coerced the defendant is often unwilling to come forward and testify, the prosecution may be without any practical means of disproving the defendant's allegations. There is good reason, then, to maintain the usual rule of placing the burden of production and persuasion together on the party raising the issue. See 2 Broun, *supra*, § 337; *ante*, at 8. The analysis may come to a different result, of course, for other defenses.

With these observations, I join the Court's opinion.

JUSTICE ALITO, with whom JUSTICE SCALIA joins, concurring.

I join the opinion of the Court with the understanding that it does not hold that the allocation of the burden of persuasion on the defense of duress may vary from one federal criminal statute to another.

Duress was an established defense at common law. See 4 W. Blackstone, Commentaries on the Laws of England 30 (1769). When Congress began to enact federal criminal statutes, it presumptively intended for those offenses to be subject to this defense. Moreover, Congress presumptively intended for the burdens of production and persuasion to be placed, as they were at common law, on the defendant. Although Congress is certainly free to alter this pattern and place one or both burdens on the prosecution, either for all or selected federal crimes, Congress has not done so but instead has continued to revise the federal criminal laws and to create new federal crimes without addressing the issue of duress. Under these circumstances, I believe that the burdens remain where they were when Congress began enacting federal criminal statutes.

I do not assume that Congress makes a new, implicit judgment about the allocation of these burdens whenever it cre-

ates a new federal crime or, for that matter, whenever it substantially revises an existing criminal statute. It is unrealistic to assume that on every such occasion Congress surveys the allocation of the burdens of proof on duress under the existing federal case law and under the law of the States and tacitly adopts whatever the predominant position happens to be at the time. Such a methodology would create serious problems for the district courts and the courts of appeals when they are required to decide where the burden of persuasion should be allocated for federal crimes enacted on different dates. If the allocation differed for different offenses, there might be federal criminal cases in which the trial judge would be forced to instruct the jury that the defendant bears the burden of persuasion on this defense for some of the offenses charged in the indictment and that the prosecution bears the burden on others.

I would also not assume, as JUSTICE BREYER does, see *post*, at 22 (dissenting opinion), that Congress has implicitly delegated to the federal courts the task of deciding in the manner of a common-law court where the burden of persuasion should be allocated. The allocation of this burden is a debatable policy question with an important empirical component. In the absence of specific direction from Congress, cf. Fed. Rule Evid. 501, I would not assume that Congress has conferred this authority on the Judiciary.

JUSTICE BREYER, with whom JUSTICE SOUTER joins, dissenting.

Courts have long recognized that "duress" constitutes a defense to a criminal charge. Historically, that defense "excuse[d] criminal conduct" if (1) a "threat of imminent death or serious bodily injury" led the defendant to commit the crime, (2) the defendant had no reasonable, legal alternative to breaking the law, and (3) the defendant was not responsible for creating the threat. *United States* v. *Bailey*, 444 U. S. 394, 409–410 (1980); see also 2 W. LaFave, Substantive

Criminal Law § 9.7(b), pp. 74–82 (2003) (hereinafter LaFave); *ante*, at 4, n. 1 (opinion of the Court). The Court decides today in respect to *federal* crimes that the defense must bear the burden of both producing evidence of duress and persuading the jury. I agree with the majority that the burden of production lies on the defendant, that here the burden of persuasion issue is not constitutional, and that Congress may allocate that burden as it sees fit. But I also believe that, in the absence of any indication of a different congressional intent, the burden of persuading the jury beyond a reasonable doubt should lie where such burdens normally lie in criminal cases, upon the prosecution.

I

My disagreement with the majority in part reflects my different view about how we should determine the relevant congressional intent. Where Congress speaks about burdens of proof, we must, of course, follow what it says. But suppose, as is normally the case, that the relevant federal statute is silent. The majority proceeds on the assumption that Congress wished courts to fill the gap by examining judicial practice *at the time that Congress enacted the particular criminal statute in question*. *Ante*, at 12–16. I would not follow that approach.

To believe Congress intended the placement of such burdens to vary from statute to statute and time to time is both unrealistic and risks unnecessary complexity, jury confusion, and unfairness. It is unrealistic because the silence could well mean only that Congress did not specifically consider the "burden of persuasion" in respect to a duress defense. It simply did not think about that secondary matter. Had it done so, would Congress have wanted courts to freeze current practice statute by statute? Would it have wanted to impose different burden-of-proof requirements where claims of duress are identical, where statutes are similar, where the *only* relevant difference is the time of enactment? Why?

Indeed, individual instances of criminal conduct often violate several statutes. In a trial for those violations, is the judge to instruct the jury to apply different standards of proof to a duress defense depending upon when Congress enacted the particular statute in question? What if in this very case the defendant's boyfriend had given her drug money and insisted (under threat of death) not only that she use some of the money to buy him a gun, but that she launder the rest? See 18 U. S. C. § 1956 (2000 ed. and Supp. II); see *infra*, at 25–27.

I would assume instead that Congress' silence typically means that Congress expected the courts to develop burden rules governing affirmative defenses as they have done in the past, by beginning with the common law and taking full account of the subsequent need for that law to evolve through judicial practice informed by reason and experience. See *Davis* v. *United States*, 160 U. S. 469 (1895); *McNabb* v. *United States*, 318 U. S. 332, 341 (1943); *ante*, at 14, n. 8 (opinion of the Court) (proposed general revision of the federal criminal code would have instructed courts to determine the contours of affirmative defenses "'according to the principles of the common law as they may be interpreted in the light of reason and experience'"); 9 J. Wigmore, Evidence § 2486, p. 291 (J. Chadbourn rev. ed. 1981) (allocation of the burdens of proof present courts with questions "of policy and fairness based on experience in the different situations"). That approach would produce uniform federal practice across different affirmative defenses, as well as across statutes passed at different points in time.

II

My approach leads me to conclude that in federal criminal cases, the prosecution should bear the duress defense burden of persuasion. The issue is a close one. In Blackstone's time the accused bore the burden of proof for all affirmative defenses. See 4 W. Blackstone, Commentaries *201; *Patterson* v. *New York*, 432 U. S. 197, 201–202 (1977). And 20th-century experts have taken different positions on the matter.

The Model Penal Code, for example, recommends placing the burden of persuasion on the prosecution. ALI, Model Penal Code § 1.12, p. 16, § 1.13(9)(c), p. 18, § 2.09, pp. 37–38 (1985). The Brown Commission recommends placing it upon the defendant. 1 National Commission on Reform of Federal Criminal Laws, Working Papers 278 (1970). And the proposed revision of the federal criminal code, agnostically, would have turned the matter over to the courts for decision. S. 1722, 96th Cong., 1st Sess., § 501 (1979). Moreover, there is a practical argument that favors the Government's position here, namely, that defendants should bear the burden of persuasion because defendants often have superior access to the relevant proof.

Nonetheless, several factors favor placing the burden on the prosecution. For one thing, in certain respects the question of duress resembles that of *mens rea*, an issue that is always for the prosecution to prove beyond a reasonable doubt. See *In re Winship*, 397 U. S. 358, 364 (1970); *Martin* v. *Ohio*, 480 U. S. 228, 234 (1987). The questions are not the same. The defendant's criminal activity here was voluntary; no external principle, such as the wind, propelled her when she acted. The Nicomachean Ethics of Aristotle, p. 54 (R. Browne transl. 1865). Moreover, her actions were intentional. Whether she wanted to buy the guns or not, and whether she wanted to lie while doing so or not, she decided to do these things and knew that she was doing them. Indeed, her action was willful in the sense that she knew that to do them was to break the law. *Ante*, at 5–7 (opinion of the Court); see also *Ratzlaf* v. *United States*, 510 U. S. 135, 136–137 (1994).

Nonetheless, where a defendant acts under duress, she lacks any semblance of a meaningful choice. In that sense her choice is not free. As Blackstone wrote, the criminal law punishes "abuse[s] of th[e] free will"; hence "it is highly just and equitable that a man should be excused for those acts, which are done through unavoidable force and compul-

sion." 4 Commentaries *27. And it is in this "force and compulsion," acting upon the will, that the resemblance to lack of *mens rea* lies. Cf. Austin, Ifs and Cans, in Proceedings of the British Academy 123–124 (1956) (noting difference between choosing to do something where one has the opportunity and ability to do otherwise and choosing to do something where one lacks any such opportunity or ability). *Davis* v. *United States*, *supra*, allocated the federal insanity defense burden to the Government partly for these reasons. That case, read in light of *Leland* v. *Oregon*, 343 U. S. 790, 797 (1952), suggests that, even if insanity does not always show the absence of *mens rea*, it does show the absence of a "'*vicious* will.'" *Davis*, *supra*, at 484 (citing Blackstone; emphasis added).

For another thing, federal courts (as a matter of statutory construction or supervisory power) have imposed the federal-crime burden of persuasion upon the prosecution in respect to self-defense, insanity, and entrapment, which resemble the duress defense in certain relevant ways. In respect to both duress and self-defense, for example, the defendant's illegal act is voluntary, indeed, intentional; but the circumstances deprive the defendant of any meaningful ability or opportunity to act otherwise, depriving the defendant of a choice that is free. Insanity, as I said, may involve circumstances that resemble, but are not identical to, a lack of *mens rea*. And entrapment requires the prosecution to prove that the defendant was "predisposed" to commit the crime—a matter sometimes best known to the defendant.

As to self-defense, see First Circuit Pattern Criminal Jury Instructions § 5.04 (1998); *United States* v. *Thomas*, 34 F. 3d 44, 47 (CA2 1994); *Government of Virgin Islands* v. *Smith*, 949 F. 2d 677, 680 (CA3 1991); *United States* v. *Harris*, Nos. 95–5637, 95–5638, 1996 U. S. App. LEXIS 22040, *4–*5 (CA4, Aug. 27, 1996); *United States* v. *Branch*, 91 F. 3d 699, 714, n. 1 (CA5 1996); Sixth Circuit Pattern Criminal Jury Instructions § 6.06 (2005); *United States* v. *Jackson*, 569 F. 2d

1003, 1008, n. 12 (CA7 1978); *United States* v. *Pierre*, 254 F. 3d 872, 876 (CA9 2001); *United States* v. *Corrigan*, 548 F. 2d 879, 883 (CA10 1977); *United States* v. *Alvarez*, 755 F. 2d 830, 842 (CA11 1985); *Bynum* v. *United States*, 408 F. 2d 1207 (CADC 1968); see also *Mullaney* v. *Wilbur*, 421 U. S. 684, 702, n. 30 (1975) (noting this as the "'majority rule'").

As to insanity, see *Davis*, 160 U. S., at 486; *Leland*, *supra*, at 797 (making clear that *Davis* determined burden allocations as a matter of federal, but not constitutional, law); but see 18 U. S. C. § 17(b) (overruling this default rule to place the burden on the defendant by clear and convincing evidence). As to entrapment, see *Jacobson* v. *United States*, 503 U. S. 540, 554 (1992) (reversing the judgment affirming the conviction because "the prosecution failed, as a matter of law, to adduce evidence to support the jury verdict that petitioner was predisposed, independent of the Government's acts and beyond a reasonable doubt," to commit the crime). See also *Patterson*, 432 U. S., at 202 (noting that *Davis* "had wide impact on the practice in the federal courts with respect to the burden of proving various affirmative defenses"); *Patterson*, *supra*, at 231 (Powell, J., dissenting) ("[S]ince this Court's decision in *Davis* . . . federal prosecutors have borne the burden of persuasion with respect to factors like insanity, self-defense, and malice or provocation, once the defendant has carried this burden of production").

Further, most federal courts, in respect to most federal crimes, have imposed the burden of persuasion in respect to the duress defense upon the Government, following *Johnson* v. *United States*, 291 F. 2d 150, 155 (CA8 1961), and authorities such as E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 13.14, p. 293 (2d ed. 1970), and the Federal Judicial Center Pattern Criminal Jury Instructions § 56 (1988). By the mid-1990's, seven Circuits had squarely placed the burden of persuasion upon the prosecution; one Circuit (the Fifth) placed the burden on the defendant; and four (the Third, Fourth, Eleventh, and District of Columbia)

did not, as far as I can tell, have a definitive practice. Compare *United States* v. *Arthurs*, 73 F. 3d 444, 448 (CA1 1996); *United States* v. *Mitchell*, 725 F. 2d 832, 836 (CA2 1983); *United States* v. *Campbell*, 675 F. 2d 815, 821 (CA6 1982); *United States* v. *Talbott*, 78 F. 3d 1183, 1186 (CA7 1996) *(per curiam)*; *United States* v. *Campbell*, 609 F. 2d 922, 925 (CA8 1979); *United States* v. *Hearst*, 563 F. 2d 1331, 1336, and n. 2 (CA9 1977) *(per curiam)*; and *United States* v. *Falcon*, 766 F. 2d 1469, 1477 (CA10 1985), with *United States* v. *Willis*, 38 F. 3d 170, 179 (CA5 1994) (putting the burden on the defendant by a preponderance). Compare also First Circuit Pattern Criminal Jury Instructions § 5.05 (1998); Sixth Circuit Pattern Criminal Jury Instructions § 6.05 (1991); Seventh Circuit Pattern Criminal Federal Jury Instructions § 6.08 (1998); and Eighth Circuit Pattern Criminal Jury Instructions §§ 3.09, 9.02 (2000), with Fifth Circuit Pattern Criminal Jury Instructions § 1.36 (2001). Petitioner adds, without contradiction, that the States allocate the burden similarly by a ratio of 2 to 1. Brief for Petitioner 32–34; Brief for United States 38, n. 30.

Beginning in 1991, the matter became more complicated because the Ninth Circuit began to require the defendant to bear the burden of proving duress in certain circumstances. *United States* v. *Dominguez-Mestas*, 929 F. 2d 1379, 1382, 1384 *(per curiam)*. And a few years later the Third, Sixth, and Eleventh Circuits followed suit in cases concerning a closely related justification defense. See *United States* v. *Dodd*, 225 F. 3d 340, 347–350 (CA3 2000); *United States* v. *Brown*, 367 F. 3d 549, 555–556 (CA6 2004); *United States* v. *Deleveaux*, 205 F. 3d 1292, 1298–1300 (CA11 2000); Eleventh Circuit Pattern Criminal Jury Instructions § 16 (2003). But see Sixth Circuit Pattern Criminal Jury Instructions § 6.05 (2005) (stating that the burden-of-proof issue for duress is undecided in that Circuit).

These latter cases, however, put the burden on the defendant only where the criminal statute narrows its *mens rea*

requirement, *i. e.*, the burden is the defendant's where the statute requires that the defendant act with "knowledge" but not, suggest these courts, where the statute requires that the defendant act "willfully," "intentionally," or "voluntarily." See, *e. g.*, *Dominguez-Mestas*, *supra*, at 1382, 1384; *United States* v. *Meraz-Solomon*, 3 F. 3d 298, 300 (CA9 1993) *(per curiam);* Ninth Circuit Pattern Criminal Jury Instructions §§ 6.5, 6.6 (2003); but see *United States* v. *Fei Lin*, 139 F. 3d 1303, 1307–1308 (CA9 1998). See also Eleventh Circuit Pattern Criminal Jury Instructions § 16 (2003); *United States* v. *Diaz*, 285 F. 3d 92, 97 (CA1 2002) (indicating that this bifurcated rule might be appropriate, but noting Circuit precedent to the contrary). Similarly, the Tenth Circuit placed the burden of proving duress upon the defendant in "strict liability" cases where *mens rea* is not an element of the crime at all. *United States* v. *Unser*, 165 F. 3d 755, 763–765 (1999).

The apparent upshot is that four Circuits now place the burden of persuasion on the prosecution across the board; one places the burden on the prosecution if the statute requires *mens rea* but not otherwise; and four have held or suggested that the burden should be on the prosecution if the statute requires an intentional or willful state of mind, but not if the statute requires only knowledge. While the Circuits are divided, apparently only one (the Fifth) agrees with the position taken by the Court today.

Further, while I concede the logic of the Government's practical argument—that defendants have superior access to the evidence—I remain uncertain of the argument's strength. After all, "[i]n every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution." *Tot* v. *United States*, 319 U. S. 463, 469 (1943). And the strict contours of the duress defense, as well as the defendant's burden of production, already substantially narrow the circumstances under which the defense may be used. A defendant may find it difficult, for example, to show duress where the

relevant conduct took place too long before the criminal act. Cf. *ante*, at 18–19 (KENNEDY, J., concurring). That is because the defendant must show that he had no alternative to breaking the law. *Supra*, at 20–21. And that will be the more difficult to show the more remote the threat. See also LaFave § 9.7, at 77–79 (duress generally requires an "immediate" or "imminent" threat, that the defendant "take advantage of a reasonable opportunity to escape," and that the defendant "terminate his conduct 'as soon as the claimed duress . . . had lost its coercive force' "). More important, the need to prove *mens rea* can easily present precisely the same practical difficulties of proof for the prosecutor. Suppose for example the defendant claims that an old lady told him that the white powder he transported across the border was medicine for her dying son. Cf. *United States* v. *Mares*, 441 F. 3d 1152 (CA10 2006). See also *Mullaney* v. *Wilbur*, 421 U. S., at 702 (requiring the government to prove an absence of passion in a murder conviction imposes "no unique hardship on the prosecution").

It is particularly difficult to see a practical distinction between this affirmative defense and, say, self-defense. The Government says that the prosecution may "be unable to call the witness most likely to have information bearing on the point," namely, the defendant. Brief for United States 21. But what is the difference in this respect between the defendant here, who says her boyfriend threatened to kill her, and a battered woman who says that she killed her husband in self-defense, where the husband's evidence is certainly unavailable? See also *Jacobson*, 503 U. S. 540 (entrapment; need to prove "propensity"). Regardless, unless the defendant testifies, it could prove difficult to satisfy the defendant's burden of *production;* and, of course, once the defendant testifies, cross-examination is possible.

In a word, I cannot evaluate the claim of practicality without somewhat more systematic evidence of the existence of a problem, say, in those Circuits that for many years have

imposed the burden on the prosecutor. And, of course, if I am wrong about the Government's practical need (and were my views to prevail), the Government would remain free to ask Congress to reallocate the burden.

Finally, there is a virtue in uniformity, in treating the federal statutory burden of persuasion similarly in respect to *actus reus*, *mens rea*, mistake, self-defense, entrapment, and duress. The Second Circuit, when imposing the burden of persuasion for duress on the prosecution, wrote that differences in this respect create "a grave possibility of juror confusion." *United States* v. *Mitchell*, 725 F. 2d 832, 836 (1983) (Newman, J., joined by Feinberg, C. J., and Friendly, J.). They risk unfairness as well.

For these reasons I believe that, in the absence of an indication of congressional intent to the contrary, federal criminal law should place the burden of persuasion in respect to the duress defense upon the prosecution, which, as is now common in respect to many affirmative defenses, it must prove beyond a reasonable doubt. With respect, I dissent.

Syllabus

FERNANDEZ-VARGAS *v.* GONZALES, ATTORNEY GENERAL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 04–1376. Argued March 22, 2006—Decided June 22, 2006

Immigration law has for some time provided that an order for removing an alien present unlawfully may be reinstated if he leaves and unlawfully reenters. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amended the Immigration and Nationality Act (INA) to enlarge the class of illegal reentrants whose orders may be reinstated and limit the possible relief from a removal order available to them. See § 241(a)(5), 8 U. S. C. § 1231(a)(5). Petitioner Fernandez-Vargas, a Mexican citizen, illegally reentered the United States in 1982, after having been deported. He remained undetected for over 20 years, fathering a son in 1989 and marrying the boy's mother, a United States citizen, in 2001. After he filed an application to adjust his status to that of a lawful permanent resident, the Government began proceedings to reinstate his 1981 deportation order under § 241(a)(5), and deported him. He petitioned the Tenth Circuit to review the reinstatement order, claiming that, because he illegally reentered the country before IIRIRA's effective date, § 241(a)(5) did not bar his application for adjustment of status, and that § 241(a)(5) would be impermissibly retroactive if it did bar his adjustment application. The court held that § 241(a)(5) barred his application and followed *Landgraf* v. *USI Film Products*, 511 U. S. 244, in determining that the new law had no impermissibly retroactive effect in his case.

Held: Section 241(a)(5) applies to those who reentered the United States before IIRIRA's effective date and does not retroactively affect any right of, or impose any burden on, the continuing violator of the INA now before this Court. Pp. 37–47.

(a) Statutes are disfavored as retroactive when their application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, *supra*, at 280. A statute is not given retroactive effect "unless such construction is required by explicit language or by necessary implication." *United States* v. *St. Louis, S. F. & T. R. Co.*, 270 U. S. 1, 3. In determining whether a statute has an impermissibly retroactive effect, the Court first looks to "whether Congress has expressly prescribed the statute's proper reach," *Land-*

graf, *supra*, at 280, and in the absence of express language tries to draw a comparably firm conclusion about the temporal reach specifically intended by applying its "normal rules of construction," *Lindh* v. *Murphy*, 521 U. S. 320, 326. If that effort fails, the Court asks whether applying the statute to the person objecting would have a retroactive effect in the disfavored sense of "affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment," *Landgraf*, *supra*, at 278. If the answer is yes, the Court then applies the presumption against retroactivity by construing the statute as inapplicable to the event or act in question. *INS* v. *St. Cyr*, 533 U. S. 289, 316. Pp. 37–38.

(b) Common principles of statutory interpretation fail to unsettle § 241(a)(5)'s apparent application to any reentrant present in the country, whatever the date of return. The statute does not expressly include in or exclude from § 241(a)(5)'s ambit individuals who illegally entered the country before IIRIRA's effective date. Fernandez-Vargas argues that the fact that the old reinstatement provision applied to aliens who had "unlawfully reentered . . . after having previously departed or been deported . . . , whether before or after June 27, 1952 [the INA's effective date], on any ground described in . . . subsection (e)," § 242(f), while § 241(a)(5) lacks language of temporal reach, shows that Congress no longer meant to cover preenactment reentrants. But the old before-or-after clause, which was sandwiched between references to departure or deportation and grounds for deportation, most naturally referred not to an alien's illegal reentry but to the previous deportation or departure. The better inference is that the clause was removed because, in 1996, application keyed to departures in 1952 or earlier was academic. Applying § 241(a)(5) only to deportations or departures after IIRIRA's effective date would exempt anyone who departed before that date but reentered after it. That would be a strange result, since the statute was revised to expand the scope of the reinstatement authority and invest it with something closer to finality. Fernandez-Vargas errs in suggesting that the new law is bereft of clarity and the Court should apply the presumption against retroactivity as a tool for interpreting the statute at the first *Landgraf* step. It is not until a statute is shown to have no firm provision about temporal reach but to produce a retroactive effect when straightforwardly applied that the presumption has its work to do. And IIRIRA has other provisions on temporal reach, which blunt Fernandez-Vargas's argument that a negative inference in his favor may be drawn from removal of the before-or-after clause. Pp. 38–42.

(c) This facial reading is confirmed by two features of IIRIRA. First, the provision's text shows that it applies here not because

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Fernandez-Vargas reentered at any particular time, but because he chose to remain after the new statute became effective. While the law looks back to "an alien [who] has reentered . . . illegally," 8 U. S. C. § 1231(a)(5), the provision does not penalize an alien for the reentry; it establishes a process to remove him under a "prior order any time after the reentry," *ibid.* Thus, it is the conduct of remaining in the country after entry that is the predicate action; the law applies to stop an indefinitely continuing violation that the alien could end at any time by voluntarily leaving. It is therefore the alien's choice to continue his illegal presence, after illegal reentry and after the new law's effective date, that subjects him to the new and less generous regime, not a past act that he is helpless to undo. *INS* v. *St. Cyr*, *supra*, distinguished. Second, IIRIRA's effective date provision shows that Fernandez-Vargas had ample warning of the coming change in the law, but chose to remain until the old regime expired and § 241(a)(5) took its place. He had an opportunity to avoid the new law's application by leaving the country and ending his violation during the six months between IIRIRA's enactment and effective date. For that matter, he could have married his son's mother and applied for adjustment of status during the period, in which case he would at least have had a claim that proven reliance on the law should be honored by applying the presumption against retroactivity. Instead, he augmented his 15 years of unlawful presence by remaining in the country into the future subject to the new law. And the presumption against retroactivity does not amount to a presumption of legal stasis for the benefit of continuous lawbreakers. Pp. 42–46.

394 F. 3d 881, affirmed.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 47.

David M. Gossett argued the cause for petitioner. With him on the briefs was *Andrew Tauber*.

Sri Srinivasan argued the cause for respondent. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Kneedler*, *Donald E. Keener*, and *Alison Marie Igoe*.*

**Trina A. Realmuto*, *Matt Adams*, *Marc Van Der Hout*, and *Stacy Tolchin* filed a brief for the American Immigration Law Foundation et al. as *amici curiae* urging reversal.

JUSTICE SOUTER delivered the opinion of the Court.

For some time, the law has provided that an order for removing an alien present unlawfully may be reinstated if he leaves and unlawfully enters again. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104–208, div. C, 110 Stat. 3009–546, enlarged the class of illegal reentrants whose orders may be reinstated and limited the possible relief from a removal order available to them. See Immigration and Nationality Act (INA), § 241(a)(5), 66 Stat. 204, as added by IIRIRA § 305(a)(3), 110 Stat. 3009–599, 8 U. S. C. § 1231(a)(5). The questions here are whether the new version of the reinstatement provision is correctly read to apply to individuals who reentered the United States before IIRIRA's effective date, and whether such a reading may be rejected as impermissibly retroactive. We hold the statute applies to those who entered before IIRIRA and does not retroactively affect any right of, or impose any burden on, the continuing violator of the INA now before us.

I

In 1950, Congress provided that deportation orders issued against some aliens who later reentered the United States illegally could be reinstated.[1] Internal Security Act of 1950, § 23(d), 64 Stat. 1012, 8 U. S. C. § 156(d) (1946 ed., Supp. V).[2] Only specific illegal reentrants were subject to the provision,

[1] What was formerly known as "deportation" is now called "removal" in IIRIRA. See Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 966 (1998) (IIRIRA "realigned the vocabulary of immigration law, creating a new category of 'removal' proceedings that largely replaces what were formerly exclusion proceedings and deportation proceedings"). Our use of each term here will vary according to the scheme under discussion.

[2] This is the full text of the provision: "Should any alien subject to the provisions of subsection (c) unlawfully return to the United States after having been released for departure or deported pursuant to this section, the previous warrant of deportation against him shall be considered as reinstated from its original date of issuance."

those deported as "anarchists" or "subversives," for example, see § 23(c), 64 Stat. 1012, while the rest got the benefit of the ordinary deportation rules. Congress retained a reinstatement provision two years later when it revised the immigration laws through the INA, § 242(f), 66 Stat. 212, as codified in this subsection:

> "Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952,[3] on any ground described . . . in subsection (e) . . . , the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry." 8 U. S. C. § 1252(f) (1994 ed.).

Again, only a limited class of illegal reentrants was susceptible, see § 242(e), 66 Stat. 211; cf. § 241(a), *id.*, at 204, and even those affected could seek some varieties of discretionary relief, see, *e. g.*, 8 U. S. C. § 1254(a)(1) (1994 ed.) (suspension of deportation available to aliens who maintained a continuous presence in the United States for seven years and could demonstrate extreme hardship and a good moral character).

In IIRIRA, Congress replaced this reinstatement provision with one that toed a harder line, as the old § 242(f) was displaced by the new § 241(a)(5):

> "If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply

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[3] A date was inserted when the provision was codified; as originally enacted, the text read, "whether before or after the date of enactment of this Act." 66 Stat. 212.

> for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry." 8 U. S. C. § 1231(a)(5) (1994 ed., Supp. III).

The new law became effective on April 1, 1997, "the first day of the first month beginning more than 180 days after" IIRIRA's enactment. § 309(a), 110 Stat. 3009–625. Unlike its predecessor, § 241(a)(5) applies to all illegal reentrants, explicitly insulates the removal orders from review, and generally forecloses discretionary relief from the terms of the reinstated order.[4]

II

Humberto Fernandez-Vargas is a citizen of Mexico, who first came to the United States in the 1970s, only to be deported for immigration violations, and to reenter, several times, his last illegal return having been in 1982. Then his luck changed, and for over 20 years he remained undetected in Utah, where he started a trucking business and, in 1989, fathered a son, who is a United States citizen. In 2001, Fernandez-Vargas married the boy's mother, who is also a United States citizen. She soon filed a relative-visa petition on behalf of her husband, see 8 U. S. C. §§ 1154(a), 1151(b) (2000 ed.); see *Fernandez-Vargas* v. *Ashcroft*, 394 F. 3d 881, 883, n. 4 (CA10 2005), on the basis of which he filed an application to adjust his status to that of lawful permanent resident, see § 1255(i). The filings apparently tipped off the authorities to his illegal presence here, and in November 2003, the Government began proceedings under § 241(a)(5) that eventuated in reinstating Fernandez-Vargas's 1981 deporta-

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[4] Notwithstanding the absolute terms in which the bar on relief is stated, even an alien subject to § 241(a)(5) may seek withholding of removal under 8 U. S. C. § 1231(b)(3)(A) (2000 ed.) (alien may not be removed to country if "the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion"), or under 8 CFR §§ 241.8(e) and 208.31 (2006) (raising the possibility of asylum to aliens whose removal order has been reinstated under INA § 241(a)(5)).

tion order, but without the possibility of adjusting his status to lawful residence. He was detained for 10 months before being removed to Juarez, Mexico, in September 2004.

Fernandez-Vargas petitioned the United States Court of Appeals for the Tenth Circuit to review the reinstatement order. He took the position that because he illegally reentered the country before IIRIRA's effective date, the controlling reinstatement provision was the old § 242(f), which meant he was eligible to apply for adjustment of status as spouse of a citizen, and he said that the new § 241(a)(5) would be impermissibly retroactive if it barred his application for adjustment. The Court of Appeals held that § 241(a)(5) did bar Fernandez-Vargas's application and followed *Landgraf* v. *USI Film Products*, 511 U. S. 244 (1994), in determining that the new law had no impermissibly retroactive effect in Fernandez-Vargas's case. 394 F. 3d, at 886, 890–891. We granted certiorari to resolve a split among the Courts of Appeals over the application of § 241(a)(5) to an alien who reentered illegally before IIRIRA's effective date,[5] 546 U. S. 975 (2005), and we now affirm.

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[5] Two Courts of Appeals have held that § 241(a)(5) does not apply at all to aliens who reentered before the provision's effective date, see *Bejjani* v. *INS*, 271 F. 3d 670 (CA6 2001); *Castro-Cortez* v. *INS*, 239 F. 3d 1037 (CA9 2001), while eight have held that it does, at least in some circumstances, see *Arevalo* v. *Ashcroft*, 344 F. 3d 1 (CA1 2003); *Avila-Macias* v. *Ashcroft*, 328 F. 3d 108 (CA3 2003); *Velasquez-Gabriel* v. *Crocetti*, 263 F. 3d 102 (CA4 2001); *Ojeda-Terrazas* v. *Ashcroft*, 290 F. 3d 292 (CA5 2002); *Faiz-Mohammad* v. *Ashcroft*, 395 F. 3d 799 (CA7 2005); *Alvarez-Portillo* v. *Ashcroft*, 280 F. 3d 858 (CA8 2002); 394 F. 3d 881 (CA10 2005) (case below); *Sarmiento Cisneros* v. *United States Attorney General*, 381 F. 3d 1277 (CA11 2004). The Courts of Appeals in the majority are themselves divided on the question whether an alien's marriage or application for adjustment of status before the statute's effective date (facts not in play here) renders the statute impermissibly retroactive when it is applied to the alien. See, *e. g.*, *Faiz-Mohammad*, *supra*, at 809–810 (application for adjustment of status); *Alvarez-Portillo*, *supra*, at 862, 867 (marriage).

III

Statutes are disfavored as retroactive when their application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf, supra,* at 280. The modern law thus follows Justice Story's definition of a retroactive statute, as "tak[ing] away or impair[ing] vested rights acquired under existing laws, or creat[ing] a new obligation, impos[ing] a new duty, or attach[ing] a new disability, in respect to transactions or considerations already past," *Society for the Propagation of the Gospel* v. *Wheeler,* 22 F. Cas. 756, 767 (No. 13,156) (CCNH 1814). Accordingly, it has become "a rule of general application" that "a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication." *United States* v. *St. Louis, S. F. & T. R. Co.,* 270 U. S. 1, 3 (1926) (opinion for the Court by Brandeis, J.).

This Court has worked out a sequence of analysis when an objection is made to applying a particular statute said to affect a vested right or to impose some burden on the basis of an act or event preceding the statute's enactment. We first look to "whether Congress has expressly prescribed the statute's proper reach," *Landgraf, supra,* at 280, and in the absence of language as helpful as that we try to draw a comparably firm conclusion about the temporal reach specifically intended by applying "our normal rules of construction," *Lindh* v. *Murphy,* 521 U. S. 320, 326 (1997). If that effort fails, we ask whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of "affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment," *Landgraf, supra,* at 278; see also *Lindh, supra,* at 326. If the answer is yes, we then apply the presumption against retroactivity by construing the statute as inapplicable to the

event or act in question owing to the "absen[ce of] a clear indication from Congress that it intended such a result." *INS* v. *St. Cyr*, 533 U. S. 289, 316 (2001); see *Martin* v. *Hadix*, 527 U. S. 343, 352 (1999) (quoting *Landgraf, supra*, at 280).

Fernandez-Vargas fights at each step of the way, arguing that Congress intended that INA §241(a)(5) would not apply to illegal reentrants like him who returned to this country before the provision's effective date; and in any event, that application of the provision to such illegal reentrants would have an impermissibly retroactive effect, to be avoided by applying the presumption against it. We are not persuaded by either contention.[6]

A

Needless to say, Congress did not complement the new version of §241(a)(5) with any clause expressly dealing with individuals who illegally reentered the country before IIRIRA's April 1, 1997, effective date, either including them within §241(a)(5)'s ambit or excluding them from it. Fernandez-Vargas argues instead on the basis of the generally available interpretive rule of negative implication, when he draws attention to language governing temporal reach contained in the old reinstatement provision, but missing from the current one. Section 242(f) applied to "any alien [who] has unlawfully reentered the United States after having previously departed or been deported pursuant to an

[6]The Government urges us to forgo *Landgraf* analysis altogether because §241(a)(5) regulates only a present removal process, not past primary conduct, citing our recent decision in *Republic of Austria* v. *Altmann*, 541 U. S. 677 (2004). Although we ultimately agree with the Government, in the abstract at least, that the reinstatement provision concerns itself with postenactment affairs, see *infra*, at 44–46, we find the Government's allusion to *Altmann* inapt. The Court's conclusion in that case, that *Landgraf* was to be avoided, turned on the peculiarities of the Foreign Sovereign Immunities Act. See *Altmann, supra*, at 694–696. Those peculiarities are absent here, and we thus advert to *Landgraf*, as we ordinarily do.

order of deportation, whether before or after June 27, 1952, on any ground described in . . . subsection (e)." 8 U. S. C. § 1252(f) (1994 ed.). According to Fernandez-Vargas, since that before-or-after clause made it clear that the statute applied to aliens who reentered before the enactment date of the earlier version, its elimination in the current iteration shows that Congress no longer meant to cover preenactment reentrants. See *Brewster* v. *Gage*, 280 U. S. 327, 337 (1930) ("deliberate selection of language . . . differing from that used in the earlier Acts" can indicate "that a change of law was intended"); cf. 2B N. Singer, Statutes and Statutory Construction § 51.04, p. 244 (6th rev. ed. 2000). But the clues are not that simple.

To begin with, the old before-or-after clause was sandwiched between references to departure or deportation under a deportation order and to grounds for deportation set out in a different subsection of the INA. It thus most naturally referred not to the illegal reentry but to the alien's previous deportation or departure. If its omission from the new subsection (a)(5) is significant, its immediate significance goes to the date of leaving this country, not the date of illegal return. Since the old clause referred to the date of enactment of the INA in 1952, the negative implication argument from dropping the language is that the reinstatement section no longer applies to those who left the country before that date. But, in 1996, application keyed to departures in 1952 or earlier was academic, and the better inference is that the clause was removed for that reason.[7]

If, moreover, we indulged any suggestion that omitting the clause showed an intent to apply § 241(a)(5) only to deportations or departures after IIRIRA's effective date, the result would be a very strange one: it would exempt from the new

[7] We therefore need not entertain Fernandez-Vargas's argument that the provision's drafting history indicates that the language was eliminated deliberately.

reinstatement provision's coverage anyone who departed before IIRIRA's effective date but reentered after it. The point of the statute's revision, however, was obviously to expand the scope of the reinstatement authority and invest it with something closer to finality, and it would make no sense to infer that Congress meant to except the broad class of persons who had departed before the time of enactment but who might return illegally at some point in the future.

Fernandez-Vargas sidesteps this problem (on a very generous reading of his argument) by making a more general suggestion of congressional intent: whatever the event to which the old law was tied, activity before as well as activity after it implicated the reinstatement power. Since the new law is bereft of such clarity, we should apply the "'longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien,'" *St. Cyr, supra,* at 320 (quoting *INS* v. *Cardoza-Fonseca,* 480 U. S. 421, 449 (1987)), which would effectively impose "[t]he presumption against retroactive application of ambiguous statutory provisions," *St. Cyr, supra,* at 320. If we did so, we would find that § 241(a)(5) operates only to reentries after its effective date.

Even at this amorphously general level, however, the argument suffers from two flaws, the first being that it puts the cart before the horse. As Fernandez-Vargas realizes, he urges application of the presumption against retroactivity as a tool for interpreting the statute at the first *Landgraf* step. But if that were legitimate, a statute lacking an express provision about temporal reach would never be construed as having a retroactive potential and the final two steps in the *Landgraf* enquiry would never occur (that is, asking whether the statute would produce a retroactive effect, and barring any such application by applying the presumption against retroactivity). It is not until a statute is shown to have no firm provision about temporal reach but to produce a retroactive effect when straightforwardly applied that the presumption has its work to do. See 511 U. S., at 280.

The second flaw is the argument's failure to account for the new statute's other provisions on temporal reach, from which one might draw a negative inference that subsection (a)(5) was (or at least may well have been) meant to apply to reentries before its effective date. In contrast to their silence about the temporal sweep of § 241(a)(5), the 1996 amendments speak directly to the scope of changes in provisions making reentry criminal and setting civil penalties. IIRIRA § 324(c), 110 Stat. 3009–629, note following 8 U. S. C. § 1326 (2000 ed.), provides that the expanded criminal prohibitions, see § 1326(a), apply only to reentries or attempts after the effective date, and § 105(b), 110 Stat. 3009–556, note following 8 U. S. C. § 1325, provides the same as to civil penalties for illegal reentry, see § 1325(b). The point here is not that these provisions alone would support an inference of intent to apply the reinstatement provision retroactively, see *Lindh*, 521 U. S., at 328, n. 4, for we require a clear statement for that, see *Martin*, 527 U. S., at 354. But these provisions do blunt any argument that removal of the before-or-after clause suffices to establish the applicability of § 241(a)(5) only to posteffective date reentries. The fact is that IIRIRA sometimes expressly made changes prospective as from its effective date and sometimes expressly provided they were applicable to earlier acts; compare §§ 324(c) and 105(b) with § 347(c), 110 Stat. 3009–639 (provision governing removal of aliens who have unlawfully voted is applicable "to voting occurring before, on, or after the date of the enactment of this Act"), and § 351(c), *id.*, at 3009–640 (provision applicable to "waivers filed before, on, or after the date of the enactment of this Act"). With such a variety of treatment, it is just too hard to infer any clear intention at any level of generality from the fact of retiring the old before-or-after language from what is now § 241(a)(5).

One conclusion can be stated, however. Common principles of statutory interpretation fail to unsettle the apparent

application of § 241(a)(5) to any reentrant present in the country, whatever the date of return.[8]

B

This facial reading is confirmed by two features of IIRIRA, not previously discussed, that describe the conduct to which § 241(a)(5) applies, and show that the application suffers from no retroactivity in denying Fernandez-Vargas the opportunity for adjustment of status as the spouse of a citizen of the United States.[9] One is in the text of that provision itself, showing that it applies to Fernandez-Vargas today not because he reentered in 1982 or at any other par-

[8] JUSTICE STEVENS states that when, in 1952, Congress inserted the before-or-after clause with the old § 242(f), it was responding to the Immigration and Naturalization Service (INS) practice of applying the reinstatement provision only to deportation orders issued after the provision's enactment, a practice that necessarily meant the INS applied the provision only to postenactment reentries. By correcting the INS's interpretation only as to deportation orders, JUSTICE STEVENS suggests, Congress did nothing to disturb the practice as to reentries. And when it removed the obsolete before-or-after clause in 1996 without adding alternative language of temporal reach, the argument goes, Congress held fast to its intent in 1950 and 1952 to apply the reinstatement provision only to postenactment reentries. But the INS's practice circa 1951 of applying the reinstatement provision only to postenactment reentries followed from its policy regarding deportation orders, and in 1952 Congress might just as easily have assumed that the branch would go the way of the root. In any event, it is difficult to accept JUSTICE STEVENS's view that congressional understanding from 40 years back was intended to govern the IIRIRA reinstatement provision, given Congress's care to make the revised criminal and civil penalties applicable only to postenactment reentries.

[9] We would reach the same conclusion about denial of opportunities to apply for permission for voluntary departure as an alternative to removal, see 8 U. S. C. § 1229c, and about cancellation of removal, see § 1229b(b), if there were a need to deal with these matters separately. Although Fernandez-Vargas argues that he is being denied the chance to seek these forms of relief, he never applied for either of them and has not formally attempted to claim them in response to the reinstatement and removal proceedings.

ticular time, but because he chose to remain after the new statute became effective. The second is the provision setting IIRIRA's effective date, § 309(a), 110 Stat. 3009–625, which shows that Fernandez-Vargas had an ample warning of the coming change in the law, but chose to remain until the old regime expired and § 241(a)(5) took its place.

As a preface to identifying the conduct by Fernandez-Vargas to which the reinstatement provision applies (the conduct that results in reinstating the old deportation order without the former opportunities to seek adjustment of status), a look at our holding in *St. Cyr*, 533 U. S. 289, is helpful. The alien, St. Cyr, was a lawful, permanent resident who made a plea agreement and pleaded guilty to an aggravated felony charge. Although the resulting conviction justified his deportation, when he entered his plea the law allowed him to seek a waiver of deportation at the discretion of the Attorney General. Between the plea and deportation proceedings, however, IIRIRA and another statute repealed the provision for that discretionary relief, converting deportation from a possibility to a certainty. *Id.*, at 325. The question was whether *Landgraf* barred application of the new law eliminating discretionary relief, on the ground that applying it to a defendant who pleaded guilty before the enactment of the new law would attach a further burdensome consequence to his plea, amounting to "a new disability, in respect to transactions or considerations already past," 533 U. S., at 321 (internal quotation marks omitted). The answer was that converting deportation from a likely possibility to a dead certainty would add such a burden, and application of the new law was accordingly barred. *Id.*, at 325. In making this "commonsense, functional judgment," *Martin*, *supra*, at 357, we emphasized that plea agreements "involve a *quid pro quo* between a criminal defendant and the government," *St. Cyr*, 533 U. S., at 321, in which a waiver of "constitutional rights (including the right to a trial)," had been exchanged for a "perceived benefit," *id.*, at

322, which in practical terms was valued in light of the possible discretionary relief, a focus of expectation and reliance, *id.*, at 323.

St. Cyr's agreement for a *quid pro quo* and his plea were entirely past, and there was no question of undoing them, but the "transactio[n] or consideratio[n]" on which § 241(a)(5) turns is different.[10] While the law looks back to a past act in its application to "an alien [who] has reentered . . . illegally," 8 U. S. C. § 1231(a)(5), the provision does not penalize an alien for the reentry (criminal and civil penalties do that); it establishes a process to remove him "under the prior order at any time after the reentry," *ibid.* Thus, it is the conduct of remaining in the country after entry that is the predicate action; the statute applies to stop an indefinitely continuing violation that the alien himself could end at any time by voluntarily leaving the country. It is therefore the alien's choice to continue his illegal presence, after illegal reentry and after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out.

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[10] We understand Fernandez-Vargas's claim as falling within the second of Justice Story's categories of retroactivity (new consequences of past acts), not the first category of canceling vested rights. The forms of relief identified by Fernandez-Vargas as rendered unavailable to him by § 241(a)(5) include cancellation of removal, see 8 U. S. C. § 1229b(b), adjustment of status, see § 1255, and voluntary departure, see § 1229c. These putative claims to relief are not "vested rights," a term that describes something more substantial than inchoate expectations and unrealized opportunities. In contrast to "an immediate fixed right of present or future enjoyment," *Pearsall* v. *Great Northern R. Co.*, 161 U. S. 646, 673 (1896) (internal quotation marks omitted), Fernandez-Vargas's claim to such relief was contingent, and it was up to him to take some action that would elevate it above the level of hope. It is not that these forms of relief are discretionary, cf. *St. Cyr*, 533 U. S., at 325; it is rather that before IIRIRA's effective date Fernandez-Vargas never availed himself of them or took action that enhanced their significance to him in particular, as St. Cyr did in making his *quid pro quo* agreement, see *supra*, at 43 and this page.

That in itself is enough to explain that Fernandez-Vargas has no retroactivity claim based on a new disability consequent to a completed act, but in fact his position is weaker still. For Fernandez-Vargas could not only have chosen to end his continuing violation and his exposure to the less favorable law, he even had an ample warning that the new law could be applied to him and ample opportunity to avoid that very possibility by leaving the country and ending his violation in the period between enactment of § 241(a)(5) and its effective date. IIRIRA became law on September 30, 1996, but it became effective and enforceable only on "the first day of the first month beginning more than 180 days after" IIRIRA's enactment, that is, April 1, 1997. § 309(a), 110 Stat. 3009–625. Unlawful alien reentrants like Fernandez-Vargas thus had the advantage of a grace period between the unequivocal warning that a tougher removal regime lay ahead and actual imposition of the less opportune terms of the new law. In that stretch of six months, Fernandez-Vargas could have ended his illegal presence and potential exposure to the coming law by crossing back into Mexico.[11]

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[11] In a series of letters submitted to the Court after oral argument, the parties dispute the consequences if Fernandez-Vargas had left voluntarily after IIRIRA's enactment and, specifically, the period of inadmissibility to which Fernandez-Vargas would thereupon have been subject. Because we conclude that § 241(a)(5) does not operate on a completed pre-enactment act, we need not consider the retroactive implications either of the fact of his inadmissibility or of any variance between the period of inadmissibility upon a postenactment voluntary return and that prescribed under the old regime. The period of inadmissibility stems from an alien's illegal reentry within a specified time after a prior removal and is applicable to Fernandez-Vargas because he reentered shortly after his 1981 deportation, but Fernandez-Vargas does not challenge as impermissibly retroactive IIRIRA's lengthening of that period from 5 to 10 or 20 years, see 8 U. S. C. § 1182(a)(6)(B) (1994 ed.); § 1182(a)(9)(A)(ii) (2000 ed.).

In any event, any period of inadmissibility is subject to waiver by the Attorney General, see § 1182(a)(6)(B) (1994 ed.); § 1182(a)(9)(A)(iii) (2000 ed.), and presumably Fernandez-Vargas could plead his serious case for such a waiver (his marriage, his child) in seeking legal reentry to the United States.

For that matter, he could have married the mother of his son and applied for adjustment of status during that period, in which case he would at least have had a claim (about which we express no opinion) that proven reliance on the old law should be honored by applying the presumption against retroactivity.[12]

Fernandez-Vargas did not, however, take advantage of the statutory warning, but augmented his past 15 years of unlawful presence by remaining in the country into the future subject to the new law, whose applicability thus turned not on the completed act of reentry, but on a failure to take timely action that would have avoided application of the new law altogether. To be sure, a choice to avoid the new law before its effective date or to end the continuing violation thereafter would have come at a high personal price, for Fernandez-Vargas would have had to leave a business and a family he had established during his illegal residence. But the branch of retroactivity law that concerns us here is meant to avoid new burdens imposed on completed acts, not all difficult choices occasioned by new law. What Fernandez-Vargas complains of is the application of new law to continuously illegal action within his control both before and after the new law took effect. He claims a right to continue illegal conduct indefinitely under the terms on which it began, an entitlement of legal stasis for those whose lawbreaking is continuous. But "[i]f every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever." L. Fuller, The Morality of Law 60 (1964) (quoted in *Landgraf*, 511 U. S., at 270, n. 24).[13]

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[12] See 394 F. 3d, at 890, and n. 11 (distinguishing Fernandez-Vargas's circumstance from that of aliens who had married, or both married and applied for adjustment of status, before IIRIRA's effective date).

[13] This is the nub of our disagreement with JUSTICE STEVENS. He says it misses the point to say that Fernandez-Vargas could avoid the new law by returning to Mexico, which he thinks is like saying that a defendant

Because we conclude that § 241(a)(5) has no retroactive effect when applied to aliens like Fernandez-Vargas, we affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE STEVENS, dissenting.

In 1982, petitioner Humberto Fernandez-Vargas, an alien who had previously been deported, reentered the United States illegally. Over the next 20 years, petitioner remained here. He worked as a truckdriver, owned a trucking business, fathered a child, and eventually married the child's mother, a United States citizen. The laws in place at the time of petitioner's entry and for the first 15 years of his residence in this country would have rewarded this behavior, allowing him to seek discretionary relief from deportation on the basis of his continued presence in and strong ties to the United States. See 8 U. S. C. § 1254(a)(1) (1994 ed.).

In 1996, however, Congress passed a new version of the applicable provision eliminating almost entirely the possibility of relief from deportation for aliens who reenter the coun-

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could avoid a retroactive criminal penalty by locking himself up for 10 years, *post*, at 48, n. 2. JUSTICE STEVENS thus argues that reimposing an order of removal to end illegal residence is like imposing a penalty for a completed act (the defendant's unspecified act in his analogy). But even on his own analysis, Fernandez-Vargas continued to violate the law by remaining in this country day after day, and JUSTICE STEVENS does not deny that the United States was entitled to bring that continuing violation to an end. He says, however, that Congress should not be understood to provide that if the violation continues into the future it may be ended on terms less favorable than those at the beginning. But this is not the position that retroactivity doctrine imputes to an inexplicit Congress. Fernandez-Vargas may have an equitable argument that the Government should not, for the future, eliminate an opportunity for continuing illegality accompanied by the hopes that long illegal residence and a prospect of marriage gave him in the past. But Congress apparently did not accept such an argument, which could prevail here only if the presumption against retroactivity amounted to a presumption of legal stasis for the benefit of continuous lawbreakers.

try illegally having previously been deported. See Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA or Act), § 305(a)(3), 110 Stat. 3009–599, 8 U. S. C. § 1231(a)(5) (2000 ed.); see also *ante*, at 35, n. 4. The 1996 provision is silent as to whether it was intended to apply retroactively to conduct that predated its enactment.[1] Despite a historical practice supporting petitioner's reading, and despite the harsh consequences that attend its application to thousands of individuals who, like petitioner, entered the country illegally before 1997, the Court not only holds that the statute applies to preenactment reentries but also that it has no retroactive effect. I disagree with both of these conclusions.

I

In 1950, when Congress first gave the Attorney General the authority to reinstate an order of deportation, it enacted a reinstatement provision containing no explicit temporal reach.[2] See Internal Security Act, § 23(d), 64 Stat. 1012, 8 U. S. C. § 156(d) (1946 ed., Supp. V). The natural reading of this provision, the one most consistent with the "deeply rooted" traditional presumption against retroactivity, *Landgraf* v. *USI Film Products*, 511 U. S. 244, 265 (1994), is that it would apply to deportations that occurred before the provision's enactment but not to preenactment reentries. While both deportation and reentry can constitute "events completed before [the provision's] enactment," *id.*, at 270, an

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[1] The statutory provisions expanding the class of people to whom criminal penalties for illegal reentry might apply, however, explicitly apply only to postenactment reentries. See IIRIRA, § 324(c), 110 Stat. 3009–629, note following 8 U. S. C. § 1326.

[2] The provision stated:

"Should any alien subject to the provisions of subsection (c) unlawfully return to the United States after having been released for departure or deported pursuant to this section, the previous warrant of deportation against him shall be considered as reinstated from its original date of issuance." 64 Stat. 1012, codified as 8 U. S. C. § 156(d) (1946 ed., Supp. V).

alien's reentry is the act that triggers the provision's operation and is therefore the act to which the provision attaches legal consequences.

When the Immigration and Naturalization Service (INS) promulgated regulations implementing the 1950 statute, however, it did not read the statute so naturally. Instead, the INS' regulations, embodying an overly strong version of the presumption against retroactivity, provided that an order of deportation could only be reinstated if that deportation occurred after the statute's enactment date. See 8 CFR § 152.5 (1950 Cum. Supp.). Thus, the INS read the reinstatement provision as inapplicable even to reentries that occurred *after* the statute's enactment date if the underlying deportation had been entered before that date; it follows *a fortiori* that the provision was considered inapplicable to reentries that occurred before the statute's enactment.

Congress corrected the INS' error two years later by adding the clause "whether before or after the date of enactment of this Act." Immigration and Nationality Act, § 242(f), 66 Stat. 212, 8 U. S. C. § 1252(f) (1994 ed.); see also *ante*, at 33–34, and nn. 2–3. As the Court correctly notes, that amendment "most naturally referred not to the illegal reentry but to the alien's previous deportation or departure." *Ante*, at 39. The best interpretation of Congress' intent with regard to the 1952 statute, then, was that it meant to apply the reinstatement provision to preenactment deportations but to preserve the status quo with regard to preenactment reentries: In accordance with the traditional presumption against retroactivity, preenactment reentries would remain uncovered by the reinstatement provision.

In 1996, when Congress enacted the current reinstatement provision, it drafted a version of the statute that, like its 1950 predecessor, was silent as to its temporal reach. See 8 U. S. C. § 1231(a)(5) (2000 ed.). If we assume (as the Court does) that the addition of the "before-or-after" clause in the 1952 statute merely clarified Congress' original intent in

1950 to make the provision applicable to preenactment departures without authorizing any application to preenactment reentries, it is reasonable to attribute precisely the same intent to the Congress that enacted the 1996 statute: As in the 1950 and 1952 versions of the provision, Congress intended the 1996 reinstatement provision to apply to preenactment deportations but not to preenactment reentries.

In sum, our normal rules of construction support the reasonable presumption that Congress intended the provision to cover only postenactment reentries. Accordingly, the 1996 reinstatement provision should not be construed to apply to petitioner's earlier entry into the United States.

II

The Court not only fails to give the 1996 Act its most normal interpretation, but also erroneously concludes that the provision does not have any retroactive effect. The Court reaches this conclusion based on its judgment that the provision applies not to conduct that occurred before the statute's enactment date, but rather to "an indefinitely continuing violation that the alien himself could end at any time by voluntarily leaving the country." *Ante*, at 44. This reasoning is unpersuasive.

It is true, of course, that the order of deportation entered against petitioner in 1981 could not be reinstated unless he was present in the United States, and that, until he was arrested in 2003, petitioner could have chosen to leave the United States. But it is precisely petitioner's "continuing violation" that allowed him to be eligible for relief from deportation in the first place: He was required to have been physically present in the United States for a period of not less than seven years, to have been a person of good moral character during that time, and to have developed ties to the United States such that his deportation would result in extreme hardship to himself or to his United States citizen

wife or child.[3] See 8 U. S. C. § 1254(a)(1) (1994 ed.); see also *INS* v. *Phinpathya*, 464 U. S. 183 (1984) (strictly construing physical presence requirement). Moreover, under the pre-1996 version of the reinstatement provision, the longer petitioner remained in the United States the more likely he was to be granted relief from deportation. See *Matter of Ige*, 20 I. & N. Dec. 880, 882 (1994) (listing factors considered in evaluating extreme hardship requirement, including alien's length of residence in United States, family in United States, business or occupation, and position in community).

Given these incentives, petitioner legitimately complains that the Government has changed the rules midgame. At the time of his entry, and for the next 15 years, it inured to petitioner's benefit for him to remain in the United States continuously, to build a business, and to start a family. After April 1, 1997, the date on which the applicable reinstatement provision became effective, all of these activities were rendered irrelevant in the eyes of the law. Only the Court's unfortunately formalistic search for a single "past act that [petitioner] is helpless to undo," *ante*, at 44, allows it to conclude that the provision at issue has no retroactive effect.[4] For regardless of whether his 1982 reentry was or

[3] Although petitioner became eligible for relief from deportation after being physically present in the United States for seven years, he could not apply for that relief until the Government placed him in deportation proceedings, at which point he could raise his eligibility as an affirmative defense. Cf. *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939, 951–952 (1997) (applying presumption against retroactivity to statute eliminating affirmative defense).

[4] Even on its own terms the Court's logic is troubling. The Court believes that petitioner could have avoided being affected by the 1996 reinstatement provision, not just retroactively but in any way whatsoever, by leaving the country prior to its effective date—a date that occurred six months after the statute's enactment date not to give aliens "ample warning," *ante*, at 43, 45, but instead to allow the Attorney General to prepare for the substantial changes caused by the IIRIRA and to promulgate regulations to effectuate that Act. See § 309, 110 Stat. 3009–625. But had

was not an act that he could now "undo," it is certainly an act to which the 1996 reinstatement provision has attached serious adverse consequences. Because the provision has an undeniably harsh retroactive effect, "absent a clear indication from Congress that it intended such a result," *INS* v. *St. Cyr*, 533 U. S. 289, 316 (2001), we should apply the presumption against retroactivity and hold that the 1996 reinstatement provision does not apply to petitioner.

Accordingly, I respectfully dissent.

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petitioner "take[n] advantage of the statutory warning," *ante*, at 46, he would have imposed upon himself the very same punishment—the guarantee of removal to Mexico—that he hopes to avoid. Just as we would not say that a defendant may avoid the retroactive application of a criminal statute by locking himself up for 10 years, it cannot be that petitioner's ability to leave the country of his own accord somehow helps to prove that the provision at issue has no retroactive effect.

Syllabus

BURLINGTON NORTHERN & SANTA FE RAILWAY CO. *v.* WHITE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05–259. Argued April 17, 2006—Decided June 22, 2006

Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on "race, color, religion, sex, or national origin," 42 U. S. C. §2000e–2(a), and its antiretaliation provision forbids "discriminat[ion] against" an employee or job applicant who, *inter alia*, has "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation, §2000e–3(a). Respondent White, the only woman in her department, operated the forklift at the Tennessee Yard of petitioner Burlington Northern & Santa Fe Railway Co. (Burlington). After she complained, her immediate supervisor was disciplined for sexual harassment, but she was removed from forklift duty to standard track laborer tasks. She filed a complaint with the Equal Employment Opportunity Commission (EEOC), claiming that the reassignment was unlawful gender discrimination and retaliation for her complaint. Subsequently, she was suspended without pay for insubordination. Burlington later found that she had not been insubordinate, reinstated her, and awarded her backpay for the 37 days she was suspended. The suspension led to another EEOC retaliation charge. After exhausting her administrative remedies, White filed an action against Burlington in federal court claiming, as relevant here, that Burlington's actions in changing her job responsibilities and suspending her for 37 days amounted to unlawful retaliation under Title VII. A jury awarded her compensatory damages. In affirming, the Sixth Circuit applied the same standard for retaliation that it applies to a substantive discrimination offense, holding that a retaliation plaintiff must show an "adverse employment action," defined as a "materially adverse change in the terms and conditions" of employment. The Circuits have come to different conclusions about whether the challenged action has to be employment or workplace related and about how harmful that action must be to constitute retaliation.

Held:

1. The antiretaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. The language of the substantive and antiretaliation provisions differ in important ways. The terms "hire," "discharge," "com-

pensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee" explicitly limit the substantive provision's scope to actions that affect employment or alter workplace conditions. The antiretaliation provision has no such limiting words. This Court presumes that, where words differ as they do here, Congress has acted intentionally and purposely. There is strong reason to believe that Congress intended the differences here, for the two provisions differ not only in language but also in purpose. The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their status, while the antiretaliation provision seeks to prevent an employer from interfering with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. To secure the first objective, Congress needed only to prohibit employment-related discrimination. But this would not achieve the second objective because it would not deter the many forms that effective retaliation can take, therefore failing to fully achieve the antiretaliation provision's purpose of "[m]aintaining unfettered access to statutory remedial mechanisms," *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 346. Thus, purpose reinforces what the language says, namely, that the antiretaliation provision is not limited to actions affecting employment terms and conditions. Neither this Court's precedent nor the EEOC's interpretations support a contrary conclusion. Nor is it anomalous to read the statute to provide broader protection for retaliation victims than for victims of discrimination. Congress has provided similar protection from retaliation in comparable statutes. And differences in the purpose of the two Title VII provisions remove any perceived "anomaly," for they justify this difference in interpretation. Pp. 61–67.

2. The antiretaliation provision covers only those employer actions that would have been materially adverse to a reasonable employee or applicant. This Court agrees with the Seventh and District of Columbia Circuits that the proper formulation requires a retaliation plaintiff to show that the challenged action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Rochon* v. *Gonzales*, 438 F. 3d 1211, 1219. The Court refers to *material* adversity to separate significant from trivial harms. The antiretaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms by prohibiting employer actions that are likely to deter discrimination victims from complaining to the EEOC, the courts, and employers. *Robinson*, *supra*, at 346. The Court refers to a *reasonable* employee's reactions because the provision's standard for judging harm must be objective, and thus judicially administrable. The standard is phrased in general terms because the

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significance of any given act of retaliation may depend upon the particular circumstances. Pp. 67–70.

3. Applying the standard to the facts of this case, there was a sufficient evidentiary basis to support the jury's verdict on White's retaliation claim. Contrary to Burlington's claim, a reassignment of duties can constitute retaliatory discrimination where both the former and present duties fall within the same job description. Almost every job category involves some duties that are less desirable than others. That is presumably why the EEOC has consistently recognized retaliatory work assignments as forbidden retaliation. Here, the jury had considerable evidence that the track laborer duties were more arduous and dirtier than the forklift operator position, and that the latter position was considered a better job by male employees who resented White for occupying it. Based on this record, a jury could reasonably conclude that the reassignment would have been materially adverse to a reasonable employee. Burlington also argues that the 37-day suspension without pay lacked statutory significance because White was reinstated with backpay. The significance of the congressional judgment that victims of intentional discrimination can recover compensatory and punitive damages to make them whole would be undermined if employers could avoid liability in these circumstances. Any insufficient evidence claim is unconvincing. White received backpay, but many reasonable employees would find a month without pay a serious hardship. White described her physical and emotional hardship to the jury, noting that she obtained medical treatment for emotional distress. An indefinite suspension without pay could well act as a deterrent to the filing of a discrimination complaint, even if the suspended employee eventually receives backpay. Thus, the jury's conclusion that the suspension was materially adverse was reasonable. Pp. 70–73.

364 F. 3d 789, affirmed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, *post*, p. 73.

Carter G. Phillips argued the cause for petitioner. With him on the briefs were *Stephen B. Kinnaird, Eric A. Shumsky, James H. Gallegos, Lawrence M. Stroik, David M. Pryor,* and *Bryan P. Neal.*

Deputy Solicitor General Garre argued the cause for the United States as *amicus curiae.* With him on the brief were *Solicitor General Clement, Assistant Attorney Gen-*

eral Kim, Acting Assistant Attorney General Katsas, Irving L. Gornstein, Marleigh D. Dover, and *Stephanie R. Marcus.*

Donald A. Donati argued the cause for respondent. With him on the briefs were *William B. Ryan* and *Eric Schnapper.**

JUSTICE BREYER delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 forbids employment discrimination against "any individual" based on that individual's "race, color, religion, sex, or national origin." Pub. L. 88–352, § 704, 78 Stat. 257, as amended, 42 U. S. C. § 2000e–2(a). A separate section of the Act—its antiretaliation provision—prohibits an employer from "discriminat[ing] against" an employee or job applicant because that individual "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation. § 2000e–3(a).

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*Briefs of *amici curiae* urging reversal were filed for the Association of American Railroads by *Maureen E. Mahoney, Jonathan C. Su,* and *Daniel Saphire;* for the Equal Employment Advisory Council et al. by *Ann Elizabeth Reesman, Laura Anne Giantris, Stephen A. Bokat, Robin S. Conrad,* and *Ellen Dunham Bryant;* for the International Municipal Lawyers Association by *Frank Waite* and *Elizabeth Lutton;* for the Pacific Legal Foundation by *Deborah J. La Fetra;* and for the Society for Human Resource Management et al. by *Allan H. Weitzman, Paul Salvatore,* and *Edward Cerasia II.*

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations et al. by *Jonathan P. Hiatt, James B. Coppess, William A. Bon, Laurence Gold,* and *Mitchell M. Kraus;* for the National Employment Lawyers Association et al. by *Douglas B. Huron, Stephen Z. Chertkof, Andrew S. Golub,* and *Marissa M. Tirona;* and for the National Women's Law Center et al. by *Thomas C. Goldstein, Amy Howe, Kevin K. Russell, Pamela S. Karlan, Marcia D. Greenberger, Jocelyn Samuels, Dina R. Lassow,* and *Charlotte Fishman.*

Michael Foreman, Sarah Crawford, and *Dennis Courtland Hayes* filed a brief for the Lawyers' Committee for Civil Rights Under Law et al. as *amici curiae.*

The Courts of Appeals have come to different conclusions about the scope of the Act's antiretaliation provision, particularly the reach of its phrase "discriminate against." Does that provision confine actionable retaliation to activity that affects the terms and conditions of employment? And how harmful must the adverse actions be to fall within its scope?

We conclude that the antiretaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

I

A

This case arises out of actions that supervisors at petitioner Burlington Northern & Santa Fe Railway Company took against respondent Sheila White, the only woman working in the Maintenance of Way department at Burlington's Tennessee Yard. In June 1997, Burlington's roadmaster, Marvin Brown, interviewed White and expressed interest in her previous experience operating forklifts. Burlington hired White as a "track laborer," a job that involves removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way. Soon after White arrived on the job, a co-worker who had previously operated the forklift chose to assume other responsibilities. Brown immediately assigned White to operate the forklift. While she also performed some of the other track laborer tasks, operating the forklift was White's primary responsibility.

In September 1997, White complained to Burlington officials that her immediate supervisor, Bill Joiner, had repeatedly told her that women should not be working in the Maintenance of Way department. Joiner, White said, had also made insulting and inappropriate remarks to her in front of her male colleagues. After an internal investigation, Burlington suspended Joiner for 10 days and ordered him to attend a sexual-harassment training session.

On September 26, Brown told White about Joiner's discipline. At the same time, he told White that he was removing her from forklift duty and assigning her to perform only standard track laborer tasks. Brown explained that the reassignment reflected co-workers' complaints that, in fairness, a "'more senior man'" should have the "less arduous and cleaner job" of forklift operator. 364 F. 3d 789, 792 (CA6 2004) (case below).

On October 10, White filed a complaint with the Equal Employment Opportunity Commission (EEOC or Commission). She claimed that the reassignment of her duties amounted to unlawful gender-based discrimination and retaliation for her having earlier complained about Joiner. In early December, White filed a second retaliation charge with the Commission, claiming that Brown had placed her under surveillance and was monitoring her daily activities. That charge was mailed to Brown on December 8.

A few days later, White and her immediate supervisor, Percy Sharkey, disagreed about which truck should transport White from one location to another. The specific facts of the disagreement are in dispute, but the upshot is that Sharkey told Brown later that afternoon that White had been insubordinate. Brown immediately suspended White without pay. White invoked internal grievance procedures. Those procedures led Burlington to conclude that White had *not* been insubordinate. Burlington reinstated White to her position and awarded her backpay for the 37 days she was

suspended. White filed an additional retaliation charge with the EEOC based on the suspension.

B

After exhausting administrative remedies, White filed this Title VII action against Burlington in federal court. As relevant here, she claimed that Burlington's actions—(1) changing her job responsibilities, and (2) suspending her for 37 days without pay—amounted to unlawful retaliation in violation of Title VII. § 2000e–3(a). A jury found in White's favor on both of these claims. It awarded her $43,500 in compensatory damages, including $3,250 in medical expenses. The District Court denied Burlington's post-trial motion for judgment as a matter of law. See Fed. Rule Civ. Proc. 50(b).

Initially, a divided Sixth Circuit panel reversed the judgment and found in Burlington's favor on the retaliation claims. 310 F. 3d 443 (2002). The full Court of Appeals vacated the panel's decision, however, and heard the matter en banc. The court then affirmed the District Court's judgment in White's favor on both retaliation claims. While all members of the en banc court voted to uphold the District Court's judgment, they differed as to the proper standard to apply. Compare 364 F. 3d, at 795–800, with *id.*, at 809 (Clay, J., concurring).

II

Title VII's antiretaliation provision forbids employer actions that "discriminate against" an employee (or job applicant) because he has "opposed" a practice that Title VII forbids or has "made a charge, testified, assisted, or participated in" a Title VII "investigation, proceeding, or hearing." § 2000e–3(a). No one doubts that the term "discriminate against" refers to distinctions or differences in treatment that injure protected individuals. See *Jackson* v. *Birmingham Bd. of Ed.*, 544 U. S. 167, 174 (2005); *Price Water-*

house v. *Hopkins*, 490 U. S. 228, 244 (1989) (plurality opinion); see also 4 Oxford English Dictionary 758 (2d ed. 1989) (def. 3b). But different Circuits have come to different conclusions about whether the challenged action has to be employment or workplace related and about how harmful that action must be to constitute retaliation.

Some Circuits have insisted upon a close relationship between the retaliatory action and employment. The Sixth Circuit majority in this case, for example, said that a plaintiff must show an "adverse employment action," which it defined as a "materially adverse change in the terms and conditions" of employment. 364 F. 3d, at 795 (internal quotation marks omitted). The Sixth Circuit has thus joined those Courts of Appeals that apply the same standard for retaliation that they apply to a substantive discrimination offense, holding that the challenged action must "resul[t] in an adverse effect on the 'terms, conditions, or benefits' of employment." *Von Gunten* v. *Maryland*, 243 F. 3d 858, 866 (CA4 2001); see *Robinson* v. *Pittsburgh*, 120 F. 3d 1286, 1300 (CA3 1997). The Fifth and the Eighth Circuits have adopted a more restrictive approach. They employ an "ultimate employment decisio[n]" standard, which limits actionable retaliatory conduct to acts "'such as hiring, granting leave, discharging, promoting, and compensating.'" *Mattern* v. *Eastman Kodak Co.*, 104 F. 3d 702, 707 (CA5 1997); see *Manning* v. *Metropolitan Life Ins. Co.*, 127 F. 3d 686, 692 (CA8 1997).

Other Circuits have not so limited the scope of the provision. The Seventh and the District of Columbia Circuits have said that the plaintiff must show that the "employer's challenged action would have been material to a reasonable employee," which in contexts like the present one means that it would likely have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Washington* v. *Illinois Dept. of Revenue*, 420 F. 3d 658, 662 (CA7 2005); see *Rochon* v. *Gonzales*, 438 F. 3d 1211, 1217–1218 (CADC 2006). And the Ninth Circuit, following EEOC

guidance, has said that the plaintiff must simply establish "'adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.'" *Ray* v. *Henderson*, 217 F. 3d 1234, 1242–1243 (2000). The concurring judges below would have applied this last mentioned standard. 364 F. 3d, at 809 (opinion of Clay, J.).

We granted certiorari to resolve this disagreement. To do so requires us to decide whether Title VII's antiretaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace. And we must characterize how harmful an act of retaliatory discrimination must be in order to fall within the provision's scope.

A

Petitioner and the Solicitor General both argue that the Sixth Circuit is correct to require a link between the challenged retaliatory action and the terms, conditions, or status of employment. They note that Title VII's substantive antidiscrimination provision protects an individual only from employment-related discrimination. They add that the antiretaliation provision should be read *in pari materia* with the antidiscrimination provision. And they conclude that the employer actions prohibited by the antiretaliation provision should similarly be limited to conduct that "affects the employee's 'compensation, terms, conditions, or privileges of employment.'" Brief for United States as *Amicus Curiae* 13 (quoting §2000e–2(a)(1)); see Brief for Petitioner 13 (same).

We cannot agree. The language of the substantive provision differs from that of the antiretaliation provision in important ways. Section 703(a) sets forth Title VII's core antidiscrimination provision in the following terms:

> "It shall be an unlawful employment practice for an employer—

> "(1) *to fail or refuse to hire or to discharge* any individual, or otherwise to discriminate against any individual *with respect to his compensation, terms, conditions, or privileges of employment,* because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way *which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee,* because of such individual's race, color, religion, sex, or national origin." § 2000e–2(a) (emphasis added).

Section 704(a) sets forth Title VII's antiretaliation provision in the following terms:

> "It shall be an unlawful employment practice for an employer *to discriminate against* any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." § 2000e–3(a) (emphasis added).

The italicized words in the substantive provision—"hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee"—explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace. No such limiting words appear in the antiretaliation provision. Given these linguistic differences, the question here is not whether identical or similar words should be read *in pari materia* to mean the same thing. See, *e. g.*, *Pasquantino* v. *United States*, 544 U. S. 349, 355, n. 2 (2005); *McFarland* v. *Scott*, 512 U. S. 849, 858 (1994); *Sullivan* v. *Everhart*, 494 U. S. 83, 92 (1990). Rather, the question is whether Congress intended its different

words to make a legal difference. We normally presume that, where words differ as they differ here, "'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello* v. *United States*, 464 U. S. 16, 23 (1983).

There is strong reason to believe that Congress intended the differences that its language suggests, for the two provisions differ not only in language but in purpose as well. The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. See *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800–801 (1973). The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i. e.*, their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, *i. e.*, their conduct.

To secure the first objective, Congress did not need to prohibit anything other than employment-related discrimination. The substantive provision's basic objective of "equality of employment opportunities" and the elimination of practices that tend to bring about "stratified job environments," *id.*, at 800, would be achieved were all employment-related discrimination miraculously eliminated.

But one cannot secure the second objective by focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated, the antiretaliation provision's objective would *not* be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace. See, *e. g.*, *Rochon*, 438 F. 3d, at 1213 (Federal Bureau of Investigation retaliation against employee "took the form of the FBI's refusal, contrary to policy, to investigate death

threats a federal prisoner made against [the agent] and his wife"); *Berry* v. *Stevinson Chevrolet*, 74 F. 3d 980, 984, 986 (CA10 1996) (finding actionable retaliation where employer filed false criminal charges against former employee who complained about discrimination). A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the antiretaliation provision's "primary purpose," namely, "[m]aintaining unfettered access to statutory remedial mechanisms." *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 346 (1997).

Thus, purpose reinforces what language already indicates, namely, that the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment. Cf. *Wachovia Bank, N. A.* v. *Schmidt*, 546 U. S. 303, 319 (2006) (rejecting statutory construction that would "[t]rea[t] venue and subject-matter jurisdiction prescriptions as *in pari materia*" because doing so would "overloo[k] the discrete offices of those concepts").

Our precedent does not compel a contrary conclusion. Indeed, we have found no case in this Court that offers petitioner or the United States significant support. *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742 (1998), as petitioner notes, speaks of a Title VII requirement that violations involve "tangible employment action" such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.*, at 761. But *Ellerth* does so only to "identify a class of [hostile work environment] cases" in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors. *Id.*, at 760; see also *Pennsylvania State Police* v. *Suders*, 542 U. S. 129, 143 (2004) (explaining holdings in *Ellerth* and *Faragher* v. *Boca Raton*, 524 U. S. 775 (1998), as dividing hostile work environment claims into two categories, one in which the employer

is strictly liable because a tangible employment action is taken and one in which the employer can make an affirmative defense). *Ellerth* did not discuss the scope of the general antidiscrimination provision. See 524 U. S., at 761 (using "concept of a tangible employment action [that] appears in numerous cases in the Courts of Appeals" only "for resolution of the vicarious liability issue"). And *Ellerth* did not mention Title VII's antiretaliation provision at all. At most, *Ellerth* sets forth a standard that petitioner and the Solicitor General believe the antiretaliation provision ought to contain. But it does not compel acceptance of their view.

Nor can we find significant support for their view in the EEOC's interpretations of the provision. We concede that the EEOC stated in its 1991 and 1988 Compliance Manuals that the antiretaliation provision is limited to "adverse employment-related action." 2 EEOC Compliance Manual § 614.1(d), p. 614–5 (1991) (hereinafter EEOC 1991 Manual); EEOC Compliance Manual § 614.1(d), p. 614–5 (1988) (hereinafter EEOC 1988 Manual). But in those same manuals the EEOC lists the "[e]ssential [e]lements" of a retaliation claim along with language suggesting a broader interpretation. EEOC 1991 Manual § 614.3(d), pp. 614–8 to 614–9 (complainant must show "that (s)he was in some manner subjected to adverse treatment by the respondent because of the protest or opposition"); EEOC 1988 Manual § 614.3(d), pp. 614–8 to 614–9 (same).

Moreover, both before and after publication of the 1991 and 1988 manuals, the EEOC similarly expressed a broad interpretation of the antiretaliation provision. Compare EEOC Interpretive Manual, Reference Manual to Title VII Law for Compliance Personnel § 491.2 (1972) (hereinafter 1972 Reference Manual) (§ 704(a) "is intended to provide 'exceptionally broad protection' for protestors of discriminatory employment practices"), with 2 EEOC Compliance Manual § 8, p. 8–13 (1998) (hereinafter EEOC 1998 Manual), available at http://www.eeoc.gov/policy/docs/retal.html (as

visited June 20, 2006, and available in Clerk of Court's case file) (§ 704(a) "prohibit[s] any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity"). And the EEOC 1998 Manual, which offers the Commission's *only* direct statement on the question of whether the antiretaliation provision is limited to the same employment-related activity covered by the antidiscrimination provision, answers that question in the negative—directly contrary to petitioner's reading of the Act. *Ibid.*

Finally, we do not accept petitioner's and the Solicitor General's view that it is "anomalous" to read the statute to provide broader protection for victims of retaliation than for those whom Title VII primarily seeks to protect, namely, victims of race-based, ethnic-based, religion-based, or gender-based discrimination. Brief for Petitioner 17; Brief for United States as *Amicus Curiae* 14–15. Congress has provided similar kinds of protection from retaliation in comparable statutes without any judicial suggestion that those provisions are limited to the conduct prohibited by the primary substantive provisions. The National Labor Relations Act, to which this Court has "drawn analogies . . . in other Title VII contexts," *Hishon* v. *King & Spalding*, 467 U. S. 69, 76, n. 8 (1984), provides an illustrative example. Compare 29 U. S. C. § 158(a)(3) (substantive provision prohibiting employer "discrimination in regard to . . . any term or condition of employment to encourage or discourage membership in any labor organization") with § 158(a)(4) (retaliation provision making it unlawful for an employer to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter"); see also *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 740 (1983) (construing antiretaliation provision to "prohibi[t] a wide variety of employer conduct that is intended to restrain, or that has the likely effect of restraining, employees

in the exercise of protected activities," including the retaliatory filing of a lawsuit against an employee); *NLRB* v. *Scrivener*, 405 U. S. 117, 121–122 (1972) (purpose of the antiretaliation provision is to ensure that employees are "'completely free from coercion against reporting'" unlawful practices).

In any event, as we have explained, differences in the purpose of the two provisions remove any perceived "anomaly," for they justify this difference of interpretation. See *supra*, at 63–64. Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U. S. 288, 292 (1960). Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends.

For these reasons, we conclude that Title VII's substantive provision and its antiretaliation provision are not coterminous. The scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. We therefore reject the standards applied in the Courts of Appeals that have treated the antiretaliation provision as forbidding the same conduct prohibited by the antidiscrimination provision and that have limited actionable retaliation to so-called "ultimate employment decisions." See *supra*, at 60.

B

The antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm. As we have explained, the Courts of Appeals have used differing language to describe the level of seriousness to which this harm must rise before it becomes actionable retaliation. We agree with the formulation set forth by the Seventh and the District of Columbia Circuits.

In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Rochon*, 438 F. 3d, at 1219 (quoting *Washington*, 420 F. 3d, at 662).

We speak of *material* adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth "a general civility code for the American workplace." *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 80 (1998); see *Faragher*, 524 U. S., at 788 (judicial standards for sexual harassment must "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing'"). An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "'snubbing' by supervisors and co-workers" are not actionable under § 704(a)). The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. *Robinson*, 519 U. S., at 346. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. *Ibid.* And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8–13.

We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plain-

tiff's unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here. See, *e. g.*, *Suders*, 542 U. S., at 141 (constructive discharge doctrine); *Harris* v. *Forklift Systems, Inc.*, 510 U. S. 17, 21 (1993) (hostile work environment doctrine).

We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale*, *supra*, at 81–82. A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children. Cf., *e. g.*, *Washington*, *supra*, at 662 (finding flex-time schedule critical to employee with disabled child). A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. See 2 EEOC 1998 Manual § 8, p. 8–14. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an "act that would be immaterial in some situations is material in others." *Washington*, *supra*, at 661.

Finally, we note that contrary to the claim of the concurrence, this standard does *not* require a reviewing court or jury to consider "the nature of the discrimination that led to the filing of the charge." *Post*, at 78 (ALITO, J., concurring in judgment). Rather, the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint. By focusing on the materiality of the challenged action and the perspective of a reason-

able person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

III

Applying this standard to the facts of this case, we believe that there was a sufficient evidentiary basis to support the jury's verdict on White's retaliation claim. See *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 150–151 (2000). The jury found that two of Burlington's actions amounted to retaliation: the reassignment of White from forklift duty to standard track laborer tasks and the 37-day suspension without pay.

Burlington does not question the jury's determination that the motivation for these acts was retaliatory. But it does question the statutory significance of the harm these acts caused. The District Court instructed the jury to determine whether respondent "suffered a materially adverse change in the terms or conditions of her employment," App. 63, and the Sixth Circuit upheld the jury's finding based on that same stringent interpretation of the antiretaliation provision (the interpretation that limits § 704 to the same employment-related conduct forbidden by § 703). Our holding today makes clear that the jury was not required to find that the challenged actions were related to the terms or conditions of employment. And insofar as the jury also found that the actions were "materially adverse," its findings are adequately supported.

First, Burlington argues that a reassignment of duties cannot constitute retaliatory discrimination where, as here, both the former and present duties fall within the same job description. Brief for Petitioner 24–25. We do not see why that is so. Almost every job category involves some responsibilities and duties that are less desirable than others. Common sense suggests that one good way to discourage

an employee such as White from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable. That is presumably why the EEOC has consistently found "[r]etaliatory work assignments" to be a classic and "widely recognized" example of "forbidden retaliation." 2 EEOC 1991 Manual § 614.7, pp. 614–31 to 614–32; see also 1972 Reference Manual § 495.2 (noting Commission decision involving an employer's ordering an employee "to do an unpleasant work assignment in retaliation" for filing racial discrimination complaint); Dec. No. 74–77, CCH EEOC Decisions (1983) ¶ 6417 (1974) ("Employers have been enjoined" under Title VII "from imposing unpleasant work assignments upon an employee for filing charges").

To be sure, reassignment of job duties is not automatically actionable. Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and "should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Oncale*, 523 U. S., at 81. But here, the jury had before it considerable evidence that the track laborer duties were "by all accounts more arduous and dirtier"; that the "forklift operator position required more qualifications, which is an indication of prestige"; and that "the forklift operator position was objectively considered a better job and the male employees resented White for occupying it." 364 F. 3d, at 803 (internal quotation marks omitted). Based on this record, a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee.

Second, Burlington argues that the 37-day suspension without pay lacked statutory significance because Burlington ultimately reinstated White with backpay. Burlington says that "it defies reason to believe that Congress would have considered a rescinded investigatory suspension with full

back pay" to be unlawful, particularly because Title VII, throughout much of its history, provided no relief in an equitable action for victims in White's position. Brief for Petitioner 36.

We do not find Burlington's last mentioned reference to the nature of Title VII's remedies convincing. After all, throughout its history, Title VII has provided for injunctions to "bar like discrimination in the future," *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 418 (1975) (internal quotation marks omitted), an important form of relief. Pub. L. 88–352, § 706(g), 78 Stat. 261, as amended, 42 U. S. C. § 2000e–5(g). And we have no reason to believe that a court could not have issued an injunction where an employer suspended an employee for retaliatory purposes, even if that employer later provided backpay. In any event, Congress amended Title VII in 1991 to permit victims of intentional discrimination to recover compensatory (as White received here) and punitive damages, concluding that the additional remedies were necessary to "'help make victims whole.'" *West* v. *Gibson*, 527 U. S. 212, 219 (1999) (citing H. R. Rep. No. 102–40, pt. 1, pp. 64–65 (1991)); see 42 U. S. C. §§ 1981a(a)(1), (b). We would undermine the significance of that congressional judgment were we to conclude that employers could avoid liability in these circumstances.

Neither do we find convincing any claim of insufficient evidence. White did receive backpay. But White and her family had to live for 37 days without income. They did not know during that time whether or when White could return to work. Many reasonable employees would find a month without a paycheck to be a serious hardship. And White described to the jury the physical and emotional hardship that 37 days of having "no income, no money" in fact caused. Brief for Respondent 4, n. 13 ("'That was the worst Christmas I had out of my life. No income, no money, and that made all of us feel bad. . . . I got very depressed'"). Indeed, she obtained medical treatment for her emotional distress.

A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former. That is to say, an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay. Cf. *Mitchell*, 361 U. S., at 292 ("[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions"). Thus, the jury's conclusion that the 37-day suspension without pay was materially adverse was a reasonable one.

IV

For these reasons, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE ALITO, concurring in the judgment.

I concur in the judgment, but I disagree with the Court's interpretation of the antiretaliation provision of Title VII of the Civil Rights Act of 1964, § 704(a), 78 Stat. 257, as amended, 42 U. S. C. § 2000e–3(a). The majority's interpretation has no basis in the statutory language and will, I fear, lead to practical problems.

I

Two provisions of Title VII are important here. Section 703(a) prohibits a broad range of discriminatory employment practices.[1] Among other things, § 703(a) makes it unlawful

[1] Section 703(a) states in pertinent part:

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or *otherwise to discriminate against* any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status

for an employer "*to discriminate against* any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a)(1) (emphasis added).

A complementary and closely related provision, §704(a), makes it unlawful to "discriminate against" an employee for retaliatory purposes. Section 704(a) states in pertinent part:

> "It shall be an unlawful employment practice for an employer to *discriminate against* any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U. S. C. §2000e–3(a) (emphasis added).

In this case, we must ascertain the meaning of the term "discriminate" in §704(a). Two possible interpretations are suggested by the language of §§703(a) and 704(a).

The first is the interpretation that immediately springs to mind if §704(a) is read by itself—*i. e.*, that the term "discriminate" in §704(a) means what the term literally means, to treat differently. Respondent staunchly defends this interpretation, which the majority does not embrace, but this interpretation presents problems that are at least sufficient to raise doubts about its correctness. Respondent's interpretation makes §703(a) narrower in scope than §704(a) and thus implies that the persons whom Title VII is principally designed to protect—victims of discrimination based on race, color, sex, national origin, or religion—receive less protection than victims of retaliation. In addition, respondent's interpretation "makes a federal case" out of any small differ-

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as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a) (emphasis added).

ence in the way an employee who has engaged in protected conduct is treated. On respondent's view, a retaliation claim must go to the jury if the employee creates a genuine issue on such questions as whether the employee was given any more or less work than others, was subjected to any more or less supervision, or was treated in a somewhat less friendly manner because of his protected activity. There is reason to doubt that Congress meant to burden the federal courts with claims involving relatively trivial differences in treatment. See *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 81 (1998); *Faragher* v. *Boca Raton*, 524 U. S. 775, 786–788 (1998).

The other plausible interpretation, and the one I favor, reads §§ 703(a) and 704(a) together. Under this reading, "discriminat[ion]" under § 704(a) means the discriminatory acts reached by § 703(a)—chiefly, discrimination "with respect to . . . compensation, terms, conditions, or privileges of employment." This is not, admittedly, the most straightforward reading of the bare language of § 704(a), but it is a reasonable reading that harmonizes §§ 703(a) and 704(a). It also provides an objective standard that permits insignificant claims to be weeded out at the summary judgment stage, while providing ample protection for employees who are subjected to real retaliation.

The Courts of Appeals that have interpreted § 704(a) in this way state that it requires a materially adverse employment action. See, *e. g.*, *Von Gunten* v. *Maryland*, 243 F. 3d 858, 865 (CA4 2001); *Gupta* v. *Florida Bd. of Regents*, 212 F. 3d 571, 587 (CA11 2000), cert. denied, 531 U. S. 1076 (2001); *Robinson* v. *Pittsburgh*, 120 F. 3d 1286, 1300 (CA3 1997). In *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742, 761–762 (1998), we "import[ed]" this test for use in a different context—to define the term "tangible employment action," a concept we used to limit an employer's liability for harassment carried out by its supervisors. We explained that "[a] tangible employment action constitutes a significant change

in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.*, at 761.

II

The majority does not adopt either of the two interpretations noted above. In Part II–A of its opinion, the majority criticizes the interpretation that harmonizes §§ 703(a) and 704(a) as not sufficiently faithful to the language of § 704(a). Although we found the materially adverse employment action test worthy of "import[ation]" in *Ellerth*, the majority now argues that this test is too narrow because it permits employers to take retaliatory measures outside the workplace. *Ante*, at 63–64 (citing *Rochon* v. *Gonzales*, 438 F. 3d 1211, 1213 (CADC 2006); *Berry* v. *Stevinson Chevrolet*, 74 F. 3d 980, 984, 986 (CA10 1996)). But the majority's concern is misplaced.

First, an employer who wishes to retaliate against an employee for engaging in protected conduct is much more likely to do so on the job. There are far more opportunities for retaliation in that setting, and many forms of retaliation off the job constitute crimes and are therefore especially risky.

Second, the materially adverse employment action test is not limited to on-the-job retaliation, as *Rochon*, one of the cases cited by the majority, illustrates. There, a Federal Bureau of Investigation agent claimed that the Bureau had retaliated against him by failing to provide the off-duty security that would otherwise have been furnished. See 438 F. 3d, at 1213–1214. But, for an FBI agent whose life may be threatened during off-duty hours, providing security easily qualifies as a term, condition, or privilege of employment. Certainly, if the FBI had a policy of denying protection to agents of a particular race, such discrimination would be actionable under § 703(a).

But in Part II–B, rather than adopting the more literal interpretation based on the language of § 704(a) alone, the

majority instead puts that language aside and adopts a third interpretation—one that has no grounding in the statutory language. According to the majority, § 704(a) does not reach all retaliatory differences in treatment but only those retaliatory acts that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Ante*, at 68 (internal quotation marks omitted).

I see no sound basis for this test. The language of § 704(a), which employs the unadorned term "discriminate," does not support this test. The unstated premise of the majority's reasoning seems to be that § 704(a)'s only purpose is to prevent employers from taking those actions that are likely to stop employees from complaining about discrimination, but this unstated premise is unfounded. While surely *one of the purposes* of § 704(a) is to prevent employers from engaging in retaliatory measures that dissuade employees from engaging in protected conduct, there is no reason to suppose that this is § 704(a)'s only purpose. Indeed, the majority itself identifies another purpose of the antiretaliation provision: "to prevent harm to individuals" who assert their rights. *Ante*, at 63. Under the majority's test, however, employer conduct that causes harm to an employee is permitted so long as the employer conduct is not so severe as to dissuade a reasonable employee from making or supporting a charge of discrimination.

III

The practical consequences of the test that the majority adopts strongly suggest that this test is not what Congress intended.

First, the majority's test leads logically to perverse results. Under the majority's test, § 704(a) reaches retaliation that well might dissuade an employee from making or supporting "a charge of discrimination." *Ante*, at 68 (internal quotation marks omitted). I take it that the phrase "*a* charge of discrimination" means the particular charge that

the employee in question filed,[2] and if that is the proper interpretation, the nature of the discrimination that led to the filing of the charge must be taken into account in applying § 704(a). Specifically, the majority's interpretation logically implies that the degree of protection afforded to a victim of retaliation is inversely proportional to the severity of the original act of discrimination that prompted the retaliation. A reasonable employee who is subjected to the most severe discrimination will not easily be dissuaded from filing a charge by the threat of retaliation; the costs of filing the charge, including possible retaliation, will have to be great to outweigh the benefits, such as preventing the continuation of the discrimination in the future and obtaining damages and other relief for past discrimination. Because the possibility of relatively severe retaliation will not easily dissuade this employee, the employer will be able to engage in relatively severe retaliation without incurring liability under § 704(a). On the other hand, an employee who is subjected to a much milder form of discrimination will be much more easily dissuaded. For this employee, the costs of complaining, including possible retaliation, will not have to be great to outweigh the lesser benefits that might be obtained by filing a charge. These topsy-turvy results make no sense.

Second, the majority's conception of a reasonable worker is unclear. Although the majority first states that its test is whether a "reasonable worker" might well be dissuaded, *ante*, at 68 (internal quotation marks omitted), it later sug-

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[2] The alternative interpretation—that "a charge" does not mean the specific charge filed by the employee but an average or generic charge—would be unworkable. Without gauging the severity of the initial alleged discrimination, a jury cannot possibly compare the costs and benefits of filing a charge and, thus, cannot possibly decide whether the employer's alleged retaliatory conduct is severe enough to dissuade the filing of a charge. A jury will have no way of assessing the severity of the average alleged act of discrimination that leads to the filing of a charge, and, therefore, if "a charge" means an average or generic charge, the majority's test will leave juries hopelessly at sea.

gests that at least some individual characteristics of the actual retaliation victim must be taken into account. The majority comments that "the significance of any given act of retaliation will often depend upon the particular circumstances," and provides the following illustration: "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children." *Ante*, at 69.

This illustration suggests that the majority's test is not whether an act of retaliation well might dissuade the average reasonable worker, putting aside all individual characteristics, but, rather, whether the act well might dissuade a reasonable worker who shares at least some individual characteristics with the actual victim. The majority's illustration introduces three individual characteristics: age, gender, and family responsibilities. How many more individual characteristics a court or jury may or must consider is unclear.

Finally, the majority's interpretation contains a loose and unfamiliar causation standard. As noted, the majority's test asks whether an employer's retaliatory act "*well might have dissuaded* a reasonable worker from making or supporting a charge of discrimination." *Ante*, at 68 (internal quotation marks omitted; emphasis added). Especially in an area of the law in which standards of causation are already complex, the introduction of this new and unclear standard is unwelcome.

For these reasons, I would not adopt the majority's test but would hold that § 704(a) reaches only those discriminatory practices covered by § 703(a).

IV

Applying this interpretation, I would affirm the decision of the Court of Appeals. The actions taken against respondent—her assignment to new and substantially less desirable duties and her suspension without pay—fall within the definition of an "adverse employment action."

With respect to respondent's reassignment, *Ellerth* specifically identified a "reassignment with significantly different responsibilities" as a "tangible employment action." 524 U. S., at 761. Here, as the Court of Appeals stated, "[i]n essence, . . . the reassignment was a demotion." 364 F. 3d 789, 803 (CA6 2004). The "new position was by all accounts more arduous and 'dirtier,'" *ibid.*, and petitioner's sole stated rationale for the reassignment was that respondent's prior duties were better suited for someone with greater seniority. This was virtually an admission that respondent was demoted when those responsibilities were taken away from her.

I would hold that respondent's suspension without pay likewise satisfied the materially adverse employment action test. Accordingly, although I would hold that a plaintiff asserting a § 704(a) retaliation claim must show the same type of materially adverse employment action that is required for a § 703(a) discrimination claim, I would hold that respondent met that standard in this case, and I, therefore, concur in the judgment.

Syllabus

WOODFORD ET AL. *v.* NGO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05–416. Argued March 22, 2006—Decided June 22, 2006

The Prison Litigation Reform Act of 1995 (PLRA) requires a prisoner to exhaust any available administrative remedies before challenging prison conditions in federal court. 42 U. S. C. § 1997e(a). Respondent filed a grievance with California prison officials about his prison conditions, but it was rejected as untimely under state law. He subsequently sued petitioner officials under § 1983 in the Federal District Court, which granted petitioners' motion to dismiss on the ground that respondent had not fully exhausted his administrative remedies under § 1997e(a). Reversing, the Ninth Circuit held that respondent had exhausted those remedies because none remained available to him.

Held: The PLRA's exhaustion requirement requires proper exhaustion of administrative remedies. Pp. 87–103.

(a) Petitioners claim that a prisoner must complete the administrative review process in accordance with applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court, but respondent contends that § 1997e(a) allows suit once administrative remedies are no longer available, regardless of the reason. To determine the correct interpretation, the Court looks for guidance to both administrative and habeas corpus law, where exhaustion is an important doctrine. Administrative law requires proper exhaustion of administrative remedies, which "means using all steps that the agency holds out, and doing so *properly*." *Pozo* v. *McCaughtry*, 286 F. 3d 1022, 1024. Habeas law has substantively similar rules, though its terminology is different. Pp. 87–93.

(b) Given this background, the Court is persuaded that the PLRA requires proper exhaustion. Pp. 93–99.

(1) By referring to "such administrative remedies as are available," § 1997e(a)'s text strongly suggests "exhausted" means what it means in administrative law. P. 93.

(2) Construing § 1997e(a) to require proper exhaustion also serves the PLRA's goals. It gives prisoners an effective incentive to make full use of the prison grievance process, thus providing prisons with a fair opportunity to correct their own errors. It reduces the quantity of prisoner suits. And it improves the quality of those suits that are filed because proper exhaustion often results in creation of an administrative

record helpful to the court. In contrast, respondent's interpretation would make the PLRA's exhaustion scheme totally ineffective, since exhaustion's benefits can be realized only if the prison grievance system is given a fair opportunity to consider the grievance. That cannot happen unless the grievant complies with the system's critical procedural rules. Respondent's arguments that his interpretation would filter out frivolous claims are unpersuasive. Pp. 93–96.

(3) As interpreted by respondent, the PLRA exhaustion requirement would be unprecedented. No statute or case purports to require exhaustion while at the same time allowing a party to bypass deliberately the administrative process by flouting the agency's procedural rules. None of his models is apt. He first suggests that the PLRA requirement was patterned on habeas law as it existed between 1963 and 1977 when, under *Fay* v. *Noia*, 372 U. S. 391, 438, a federal habeas claim could be procedurally defaulted only if the prisoner deliberately bypassed state remedies. That would be fanciful, however. The PLRA was enacted contemporaneously with the Antiterrorism and Effective Death Penalty Act of 1996, which gave federal habeas review a structure markedly different from what existed before 1977. Furthermore, respondent's interpretation would not duplicate that scheme, for it would permit a prisoner to bypass deliberately administrative review with no risk of sanction. Respondent next suggests that the PLRA exhaustion requirement is patterned on § 14(b) of the Age Discrimination in Employment Act of 1967 and § 706(e) of Title VII of the Civil Rights Act of 1964, but neither provision is in any sense an exhaustion provision. Pp. 96–99.

(c) Respondent's remaining arguments regarding § 1997e(a)'s interpretation are also unconvincing. Pp. 99–103.

403 F. 3d 620, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in the judgment, *post*, p. 103. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined, *post*, p. 104.

Jennifer G. Perkell, Deputy Attorney General of California, argued the cause for petitioners. With her on the briefs were *Bill Lockyer*, Attorney General, *Manuel M. Madeiros*, State Solicitor General, *James M. Humes*, Chief Assistant Attorney General, *Frances T. Grunder*, Senior Assistant Attorney General, and *Thomas S. Patterson*, Supervising Deputy Attorney General.

Dan Himmelfarb argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Garre*, and *Barbara L. Herwig*.

Meir Feder argued the cause for respondent. With him on the brief were *Charles R. A. Morse* and *Donald B. Ayer*.*

JUSTICE ALITO delivered the opinion of the Court.

This case presents the question whether a prisoner can satisfy the Prison Litigation Reform Act's exhaustion requirement, 42 U. S. C. § 1997e(a), by filing an untimely or otherwise procedurally defective administrative grievance or

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*A brief of *amici curiae* urging reversal was filed for the State of New York et al. by *Eliot Spitzer*, Attorney General of New York, *Caitlin J. Halligan*, Solicitor General, *Robert H. Easton*, Deputy Solicitor General, and *Richard Dearing*, Assistant Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *John W. Suthers* of Colorado, *Carl C. Danberg* of Delaware, *Robert J. Spagnoletti* of the District of Columbia, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Phill Kline* of Kansas, *Thomas F. Reilly* of Massachusetts, *Michael A. Cox* of Michigan, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *George J. Chanos* of Nevada, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry McMaster* of South Carolina, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Judith Williams Jagdmann* of Virginia, *Kerry E. Drue* of the Virgin Islands, and *Rob McKenna* of Washington.

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *Michael S. Greco;* for the American Civil Liberties Union et al. by *Margo Schlanger, David C. Fathi, Elizabeth Alexander, Steven R. Shapiro, Steven Banks*, and *John Boston;* for the Jerome N. Frank Legal Services Organization of the Yale Law School by *Giovanna Shay;* for Law Professors by *Kermit Roosevelt III, Erwin Chemerinsky, David L. Franklin, Amanda Frost, Seth Kreimer, Daniel Manville, John Oakley, Malla Pollack*, and *David Rudovsky*, all *pro se*.

appeal. We hold that proper exhaustion of administrative remedies is necessary.

I

A

Congress enacted the Prison Litigation Reform Act of 1995 (PLRA), 110 Stat. 1321–71, as amended, 42 U. S. C. § 1997e *et seq.*, in 1996 in the wake of a sharp rise in prisoner litigation in the federal courts, see, *e. g.*, *Alexander* v. *Hawk*, 159 F. 3d 1321, 1324–1325 (CA11 1998) (citing statistics). The PLRA contains a variety of provisions designed to bring this litigation under control. See, *e. g.*, § 1997e(c) (requiring district courts to weed out prisoner claims that clearly lack merit); § 1997e(e) (prohibiting claims for emotional injury without prior showing of physical injury); § 1997e(d) (restricting attorney's fees).

A centerpiece of the PLRA's effort "to reduce the quantity . . . of prisoner suits" is an "invigorated" exhaustion provision, § 1997e(a). *Porter* v. *Nussle*, 534 U. S. 516, 524 (2002). Before 1980, prisoners asserting constitutional claims had no obligation to exhaust administrative remedies. See *Wilwording* v. *Swenson*, 404 U. S. 249, 251 (1971) *(per curiam)*. In the Civil Rights of Institutionalized Persons Act, § 7, 94 Stat. 352–353, Congress enacted a weak exhaustion provision, which authorized district courts to stay actions under Rev. Stat. § 1979, 42 U. S. C. § 1983, for a limited time while a prisoner exhausted "such plain, speedy, and effective administrative remedies as are available." § 1997e(a)(1) (1994 ed.). "Exhaustion under the 1980 prescription was in large part discretionary; it could be ordered only if the State's prison grievance system met specified federal standards, and even then, only if, in the particular case, the court believed the requirement 'appropriate and in the interests of justice.'" *Nussle*, *supra*, at 523 (quoting § 1997e). In addition, this provision did not require exhaustion if the prisoner sought only money damages and such

relief was not available under the relevant administrative scheme. See *McCarthy* v. *Madigan*, 503 U. S. 140, 150–151 (1992).

The PLRA strengthened this exhaustion provision in several ways. Exhaustion is no longer left to the discretion of the district court, but is mandatory. See *Booth* v. *Churner*, 532 U. S. 731, 739 (2001). Prisoners must now exhaust all "available" remedies, not just those that meet federal standards. Indeed, as we held in *Booth*, a prisoner must now exhaust administrative remedies even where the relief sought—monetary damages—cannot be granted by the administrative process. *Id.*, at 734. Finally, exhaustion of available administrative remedies is required for any suit challenging prison conditions, not just for suits under § 1983. *Nussle*, *supra*, at 524.

B

California has a grievance system for prisoners who seek to challenge their conditions of confinement. To initiate the process, an inmate must fill out a simple form, Dept. of Corrections, Inmate/Parolee Appeal Form, CDC 602 (12/87) (hereinafter Form 602), that is made "readily available to all inmates." Cal. Code Regs., tit. 15, § 3084.1(c) (2004). The inmate must fill out two parts of the form: part A, which is labeled "Describe Problem," and part B, which is labeled "Action Requested." Then, as explained on Form 602 itself, the prisoner "must first informally seek relief through discussion with the appropriate staff member." App. 40–41. The staff member fills in part C of Form 602 under the heading "Staff Response" and then returns the form to the inmate.

If the prisoner is dissatisfied with the result of the informal review, or if informal review is waived by the State, the inmate may pursue a three-step review process. See §§ 3084.5(b)–(d). Although California labels this "formal" review (apparently to distinguish this process from the prior step), the three-step process is relatively simple. At the first level, the prisoner must fill in part D of Form 602, which

states: "If you are dissatisfied, explain below." *Id.*, at 40. The inmate then must submit the form, together with a few other documents, to the appeals coordinator within 15 working days—three weeks—of the action taken. § 3084.6(c). This level may be bypassed by the appeals coordinator in certain circumstances. § 3084.5(b). Within 15 working days after an inmate submits an appeal, the reviewer must inform the inmate of the outcome by completing part E of Form 602 and returning the form to the inmate.

If the prisoner receives an adverse determination at this first level, or if this level is bypassed, the inmate may proceed to the second level of review conducted by the warden. §§ 3084.5(c), (e)(1). The inmate does this by filling in part F of Form 602 and submitting the form within 15 working days of the prior decision. Within 10 working days thereafter, the reviewer provides a decision on a letter that is attached to the form. If the prisoner's claim is again denied or the prisoner otherwise is dissatisfied with the result, the prisoner must explain the basis for his or her dissatisfaction on part H of the form and mail the form to the Director of the California Department of Corrections and Rehabilitation within 15 working days. § 3084.5(e)(2). An inmate's appeal may be rejected where "[t]ime limits for submitting the appeal are exceeded and the appellant had the opportunity to file within the prescribed time constraints." § 3084.3(c)(6).

C

Respondent is a prisoner who was convicted for murder and is serving a life sentence in the California prison system. In October 2000, respondent was placed in administrative segregation for allegedly engaging in "inappropriate activity" in the prison chapel. Two months later, respondent was returned to the general population, but respondent claims that he was prohibited from participating in "special programs," including a variety of religious activities.

Approximately six months after that restriction was imposed, respondent filed a grievance with prison officials challenging that action. That grievance was rejected as untimely because it was not filed within 15 working days of the action being challenged. See §§ 3084.3(c)(6), 3084.6(c).

Respondent appealed that decision internally without success, and subsequently sued petitioners—California correctional officials—under 42 U. S. C. § 1983 in Federal District Court. The District Court granted petitioners' motion to dismiss because respondent had not fully exhausted his administrative remedies as required by § 1997e(a). See App. to Pet. for Cert. 24–25.

The Court of Appeals for the Ninth Circuit reversed and held that respondent had exhausted administrative remedies simply because no such remedies remained available to him. 403 F. 3d 620, 629–630 (2005). The Ninth Circuit's decision, while consistent with the decision of a divided panel of the Sixth Circuit in *Thomas* v. *Woolum*, 337 F. 3d 720 (2003), conflicts with decisions of four other Courts of Appeals. See *Pozo* v. *McCaughtry*, 286 F. 3d 1022, 1025 (CA7) ("To exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require"), cert. denied, 537 U. S. 949 (2002); *Ross* v. *County of Bernalillo*, 365 F. 3d 1181, 1185–1186 (CA10 2004) (same); *Spruill* v. *Gillis*, 372 F. 3d 218, 230 (CA3 2004) (same); *Johnson* v. *Meadows*, 418 F. 3d 1152, 1159 (CA11 2005) (same). We granted certiorari to address this conflict, 546 U. S. 1015 (2005), and we now reverse.

II

A

The PLRA provides as follows:

> "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other

> Federal law, by a prisoner confined in any jail, prison, or other correctional facility *until such administrative remedies as are available are exhausted.*" § 1997e(a) (2000 ed.) (emphasis added).

There is no dispute that this language requires a prisoner to "exhaust" administrative remedies, but the parties differ sharply in their understanding of the meaning of this requirement. Petitioners argue that this provision requires proper exhaustion. This means, according to petitioners, that a prisoner must complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court. Respondent, on the other hand, argues that this provision demands what he terms "exhaustion *simpliciter*." Brief for Respondent 7. In his view, § 1997e(a) simply means that a prisoner may not bring suit in federal court until administrative remedies are no longer available. Under this interpretation, the reason why administrative remedies are no longer available is irrelevant. Bare unavailability suffices even if this results from a prisoner's deliberate strategy of refraining from filing a timely grievance so that the litigation of the prisoner's claim can begin in federal court.

The key for determining which of these interpretations of § 1997e(a) is correct lies in the term of art "exhausted." Exhaustion is an important doctrine in both administrative and habeas law, and we therefore look to those bodies of law for guidance.

B

"The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law." *McKart* v. *United States*, 395 U. S. 185, 193 (1969). "The doctrine provides 'that no one is entitled to judicial relief

for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *Ibid.* (quoting *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51 (1938)). Exhaustion of administrative remedies serves two main purposes. See *McCarthy*, 503 U. S., at 145.

First, exhaustion protects "administrative agency authority." *Ibid.* Exhaustion gives an agency "an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court," and it discourages "disregard of [the agency's] procedures." *Ibid.*

Second, exhaustion promotes efficiency. *Ibid.* Claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court. In some cases, claims are settled at the administrative level, and in others, the proceedings before the agency convince the losing party not to pursue the matter in federal court. See *ibid.*; *Parisi* v. *Davidson*, 405 U. S. 34, 37 (1972); *McKart*, *supra*, at 195. "And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration." *McCarthy*, *supra*, at 145.

Because of the advantages of administrative review, some aggrieved parties will voluntarily exhaust all avenues of administrative review before resorting to federal court, and for these parties an exhaustion requirement is obviously unnecessary. Statutes requiring exhaustion serve a purpose when a significant number of aggrieved parties, if given the choice, would not voluntarily exhaust. Aggrieved parties may prefer not to exhaust administrative remedies for a variety of reasons. Although exhaustion promotes overall efficiency, a party may conclude—correctly or incorrectly—that exhaustion is not efficient in that party's particular case. In addition, some aggrieved parties may prefer to proceed

directly to federal court for other reasons, including bad faith.[1] See *Thomas*, 337 F. 3d, at 752–753 (Rosen, J., dissenting in part and concurring in judgment).

Because exhaustion requirements are designed to deal with parties who do not want to exhaust, administrative law creates an incentive for these parties to do what they would otherwise prefer not to do, namely, to give the agency a fair and full opportunity to adjudicate their claims. Administrative law does this by requiring proper exhaustion of administrative remedies, which "means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)." *Pozo*, 286 F. 3d, at 1024 (emphasis in original). This Court has described the doctrine as follows: "[A]s a general rule . . . courts should not topple over administrative decisions unless the administrative body not only has erred, *but has erred against objection made at the time appropriate under its practice.*" *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 37 (1952) (emphasis added). See also *Sims* v. *Apfel*, 530 U. S. 103, 108 (2000); *id.*, at 112 (O'Connor, J., concurring in part and concurring in judgment) ("On this underlying principle of administrative law, the Court is unanimous"); *id.*, at 114–115 (BREYER, J., dissenting); *Unemployment Compensation Comm'n of Alaska* v. *Aragon*, 329 U. S. 143, 155 (1946); *Hormel* v. *Helvering*, 312 U. S. 552, 556–557 (1941); 2 K. Davis & R. Pierce, Administrative Law Treatise § 15:8, pp. 341–344 (3d ed. 1994). Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively with-

[1] One can conceive of an inmate's seeking to avoid creating an administrative record with someone that he or she views as a hostile factfinder, filing a lawsuit primarily as a method of making some corrections official's life difficult, or perhaps even speculating that a suit will mean a welcome—if temporary—respite from his or her cell.

out imposing some orderly structure on the course of its proceedings.[2]

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[2] The dissent makes two chief arguments regarding the doctrine of exhaustion in administrative law. Neither is sound.

First, the dissent contends that, "in the absence of explicit statutory directive," proper exhaustion is required only in proceedings that are in the nature of "appellate review proceedings." *Post*, at 112 (opinion of STEVENS, J.). The only authorities cited in support of this proposition are *Sims* v. *Apfel*, 530 U. S. 103, 108–109 (2000)—which concerns different questions, *i. e.*, issue exhaustion and the distinction between adversarial and nonadversarial proceedings—and an *amici* brief, which in turns cites no supporting authority. See *post*, at 112 (citing Brief for Law Professors 1). The *amici* brief argues that "[t]he conceptual key to this case is [the] distinction" between an "original proceeding," in which "the court is simply determining the legality of out-of-court action," and a "review proceeding," in which the court must "review the decision of some other adjudicator." *Id.*, at 2–3. According to the *amici* brief, habeas petitions are prime examples of "review proceeding[s]" because they "ask federal courts to review the decisions of state courts." *Id.*, at 3. This argument is deeply flawed.

"[H]abeas corpus [is] an original . . . civil remedy for the enforcement of the right to personal liberty, rather than . . . a stage of the state criminal proceedings . . . or as an appeal therefrom." *Fay* v. *Noia*, 372 U. S. 391, 423–424 (1963) (footnote omitted). And habeas law includes the "judge-made doctrine of procedural default." *Post*, at 108, n. 5. This shows that the dissent and the *amici* brief are incorrect in contending that a proper exhaustion requirement is incompatible with an original proceeding.

Second, the dissent argues that, even if administrative law generally requires proper exhaustion, respondent falls within an exception to that rule. *Post*, at 114. As the dissent puts it, "[b]ecause respondent has raised constitutional claims, . . . the Court may not, as a matter of federal common law, apply an extrastatutory waiver requirement against him." *Ibid.* But we are not applying an "extrastatutory" requirement "as a matter of federal common law." *Ibid.* We are interpreting and applying the statutory requirement set out in the PLRA exhaustion provision. We interpret the PLRA exhaustion provision to require proper exhaustion, not the unprecedented scheme of exhaustion *simpliciter* that respondent advocates. As for the suggestion that the PLRA might be meant to require proper exhaustion of nonconstitutional claims but not constitutional claims, we fail to see how such a carve-out would serve Congress' purpose of addressing a flood of prisoner litigation in the federal courts, see *supra*,

C

The law of habeas corpus has rules that are substantively similar to those described above. The habeas statute generally requires a state prisoner to exhaust state remedies before filing a habeas petition in federal court. See 28 U. S. C. §§ 2254(b)(1), (c). "This rule of comity reduces friction between the state and federal court systems by avoiding the 'unseem[liness]' of a federal district court's overturning a state-court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance." *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 845 (1999) (alteration in original). A state prisoner is generally barred from obtaining federal habeas relief unless the prisoner has properly presented his or her claims through one "complete round of the State's established appellate review process." *Ibid.* In practical terms, the law of habeas, like administrative law, requires proper exhaustion, and we have described this feature of habeas law as follows: "To . . . 'protect the integrity' of the federal exhaustion rule, we ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies . . . ." *Id.*, at 848 (citation omitted; emphasis in original).

The law of habeas, however, uses terminology that differs from that of administrative law. In habeas, the sanction for failing to exhaust properly (preclusion of review in federal court) is given the separate name of procedural default, although the habeas doctrines of exhaustion and procedural default "are similar in purpose and design and implicate similar concerns," *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 7 (1992). See also *Coleman* v. *Thompson*, 501 U. S. 722, 731–732 (1991). In habeas, state-court remedies are described as having been "exhausted" when they are no longer available, regardless of

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at 84, when the overwhelming majority of prisoner civil rights and prison condition suits are based on the Constitution.

the reason for their unavailability. See *Gray* v. *Netherland*, 518 U. S. 152, 161 (1996). Thus, if state-court remedies are no longer available because the prisoner failed to comply with the deadline for seeking state-court review or for taking an appeal, those remedies are technically exhausted, *ibid.*, but exhaustion in this sense does not automatically entitle the habeas petitioner to litigate his or her claims in federal court. Instead, if the petitioner procedurally defaulted those claims, the prisoner generally is barred from asserting those claims in a federal habeas proceeding. *Id.*, at 162; *Coleman*, *supra*, at 744–751.

III

With this background in mind, we are persuaded that the PLRA exhaustion requirement requires proper exhaustion.

A

The text of 42 U. S. C. § 1997e(a) strongly suggests that the PLRA uses the term "exhausted" to mean what the term means in administrative law, where exhaustion means proper exhaustion. Section 1997e(a) refers to "such administrative remedies as are available," and thus points to the doctrine of exhaustion in administrative law.

B

Construing § 1997e(a) to require proper exhaustion also fits with the general scheme of the PLRA, whereas respondent's interpretation would turn that provision into a largely useless appendage. The PLRA attempts to eliminate unwarranted federal-court interference with the administration of prisons,[3] and thus seeks to "affor[d] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Nussle*, 534 U. S., at 525. See also *Booth*, 532 U. S., at 739. The PLRA also

[3] See, *e. g.*, 18 U. S. C. § 3626(b)(2) (termination of prison conditions consent decrees).

was intended to "reduce the quantity and improve the quality of prisoner suits." *Nussle, supra,* at 524.

Requiring proper exhaustion serves all of these goals. It gives prisoners an effective incentive to make full use of the prison grievance process and accordingly provides prisons with a fair opportunity to correct their own errors. This is particularly important in relation to state corrections systems because it is "difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser* v. *Rodriguez,* 411 U. S. 475, 491–492 (1973).

Proper exhaustion reduces the quantity of prisoner suits because some prisoners are successful in the administrative process, and others are persuaded by the proceedings not to file an action in federal court.[4] Finally, proper exhaustion

[4] The dissent's objection, *post,* at 115–116, that exhaustion *simpliciter* is enough to reduce frivolous prisoner suits is not well taken. First, what matters is not whether proper exhaustion was necessary to reach that goal, but whether proper exhaustion was mandated by Congress. Second, the empirical support for the dissent's conclusion is weak. The dissent points to a drop in volume of prisoner litigation between 1995 and 2000 and concludes that exhaustion *simpliciter* "was sufficient to reduce the quantity of prisoner suits without any procedural default requirement." *Post,* at 116. But this mistakes correlation for causation: A requirement of exhaustion *simpliciter* will not, absent a mollified prisoner, prevent a case from being docketed—and thus appearing in the filing statistics the dissent cites. The credit for reduced filings more likely belongs to the PLRA's enactment of 28 U. S. C. § 1915A (requiring district courts to screen "before docketing, if feasible," prisoner civil complaints), and its amendments to § 1915 (forbidding frequent-filer prisoners from proceeding *in forma pauperis*). Finally, prisoner civil rights and prison conditions cases still account for an outsized share of filings: From 2000 through 2005, such cases represented between 8.3% and 9.8% of the new filings in the federal district courts, or on average about one new prisoner case every other week for each of the nearly 1,000 active and senior district judges across the country. See Administrative Office of the United States Courts, Judicial Facts and Figures, tbls. 1.1, 4.4, 4.6, http://www.uscourts.gov/judicialfactsfigures/contents.html (as visited June 19, 2006, and available in Clerk of Court's case file).

improves the quality of those prisoner suits that are eventually filed because proper exhaustion often results in the creation of an administrative record that is helpful to the court. When a grievance is filed shortly after the event giving rise to the grievance, witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved.

While requiring proper exhaustion serves the purposes of the PLRA, respondent's interpretation of § 1997e(a) would make the PLRA exhaustion scheme wholly ineffective. The benefits of exhaustion can be realized only if the prison grievance system is given a fair opportunity to consider the grievance. The prison grievance system will not have such an opportunity unless the grievant complies with the system's critical procedural rules. A prisoner who does not want to participate in the prison grievance system will have little incentive to comply with the system's procedural rules unless noncompliance carries a sanction, and under respondent's interpretation of the PLRA noncompliance carries no significant sanction. For example, a prisoner wishing to bypass available administrative remedies could simply file a late grievance without providing any reason for failing to file on time. If the prison then rejects the grievance as untimely, the prisoner could proceed directly to federal court. And acceptance of the late grievance would not thwart the prisoner's wish to bypass the administrative process; the prisoner could easily achieve this by violating other procedural rules until the prison administration has no alternative but to dismiss the grievance on procedural grounds. We are confident that the PLRA did not create such a toothless scheme.

Respondent argues that his interpretation of the PLRA's exhaustion provision would filter out frivolous claims because, by the time the deadline for filing a grievance has passed, the inmate may no longer wish to file suit. Brief for Respondent 43. But since the deadline for filing an administrative grievance is generally not very long—14 to 30 days

according to the United States, see Brief for United States as *Amicus Curiae* 29, and even less according to respondent, see Brief for Respondent 30, n. 17—it is doubtful that Congress thought requiring a prisoner to wait this long would provide much of a deterrent. Indeed, many prisoners would probably find it difficult to prepare, file, and serve a civil complaint before the expiration of the deadline for filing a grievance in many correctional systems.

Respondent also contends that his interpretation of the PLRA exhaustion requirement would filter out frivolous claims because prisoners could not simply wait until the deadline for filing an administrative grievance had passed. According to respondent, "most grievance systems give administrators the discretion to hear untimely grievances," and therefore a prisoner "will be required to file an untimely grievance, and thereby give the grievance system" the opportunity to address the complaint. *Id.*, at 43. But assuming for the sake of argument that the premise of this argument is correct, *i. e.*, that a court could never conclude that administrative remedies were unavailable unless an administrative decision had so held, but see *Coleman*, 501 U. S., at 735, n., a prisoner who does not want to participate in the prison grievance process would have little difficulty in forcing the prison to dismiss his administrative case on procedural grounds. Under the California system, for example, a prisoner has numerous opportunities to miss deadlines. Therefore, the task of engineering such a dismissal of a grievance on procedural grounds is unlikely to be sufficient to alter the conduct of a prisoner whose objective is to bypass the administrative process.

C

Finally, as interpreted by respondent, the PLRA exhaustion requirement would be unprecedented. Respondent has not pointed to any statute or case that purports to require

exhaustion while at the same time allowing a party to bypass deliberately the administrative process by flouting the agency's procedural rules. It is most unlikely that the PLRA, which was intended to deal with what was perceived as a disruptive tide of frivolous prisoner litigation, adopted an exhaustion requirement that goes further than any other model that has been called to our attention in permitting the wholesale bypassing of administrative remedies. Respondent identifies three models for the scheme of "exhaustion *simpliciter*" that he believes is set out in the PLRA, but none of these examples is apt.

Respondent first looks to habeas law as it existed prior to *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). Before then, a federal habeas claim could be procedurally defaulted only if the prisoner deliberately bypassed state remedies. See *Fay* v. *Noia*, 372 U. S. 391, 438 (1963). It would be fanciful, however, to suggest that the PLRA exhaustion requirement was patterned on habeas law as it existed in the years between *Fay* and *Wainwright*. As respondent stresses, the PLRA was enacted contemporaneously with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, which gave federal habeas review a structure markedly different from that which existed in the period between *Fay* and *Wainwright*.

Furthermore, respondent's interpretation of § 1997e(a) would not duplicate the scheme that existed in habeas during that interval. As interpreted by respondent, § 1997e(a) would permit a prisoner to bypass deliberately and flagrantly administrative review without any risk of sanction. Because it is unlikely that the PLRA was intended to permit this, the two Courts of Appeals that have held that § 1997e(a) does not require proper exhaustion both pointedly stated that their decisions did not allow a prisoner to bypass deliberately administrative remedies. See 403 F. 3d, at 629; *Thomas*, 337 F. 3d, at 732, and n. 4. Neither of these courts,

however, explained how § 1997e(a) can be interpreted in this way—that is, so that it does not require proper exhaustion but somehow proscribes deliberate bypass.

Apparently recognizing that such an interpretation neither has a statutory basis nor refers to a concept of exhaustion from an existing body of law, respondent does not contend that § 1997e(a) prohibits deliberate bypass; in his view, all that § 1997e(a) demands is that a prisoner wait until any opportunity for administrative review has evaporated. But in making this argument, respondent asks us to hold that the PLRA was meant to adopt an exhaustion scheme that stands in sharp contrast to both current and past habeas law and is unlike any other exhaustion scheme that has been called to our attention.

Respondent next suggests that the PLRA exhaustion requirement was patterned on § 14(b) of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 607, codified at 29 U. S. C. § 633(b), and § 706(e) of Title VII of the Civil Rights Act of 1964, 78 Stat. 260, as redesignated and amended, 42 U. S. C. § 2000e–5(e), but these are implausible models. Neither of these provisions makes reference to the concept of exhaustion, and neither is in any sense an exhaustion provision.

In *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750 (1979), we considered § 14(b) of the ADEA, which provides that, if a State has an agency to redress state-law age-related employment-discrimination claims, an ADEA claim may not be brought in federal court "before the expiration of sixty days *after proceedings have been commenced* under the State law." 29 U. S. C. § 633(b) (emphasis added). This provision makes no reference to the exhaustion of state remedies, only to the "commence[ment]" of state proceedings, and this provision leaves no doubt that proper commencement of those proceedings is not required. As we noted, see *Oscar Mayer*, 441 U. S., at 759, § 14(b) of the ADEA states that the requirement of commencement is satisfied merely by sending

the state agency a signed statement of the pertinent facts, and § 14(b) explicitly provides that the commencement requirement does not entail compliance with any other state procedural rule, including a deadline for initiating the state proceeding, *id.*, at 760. We see little similarity between § 14(b), which merely requires the commencement of state proceedings and *explicitly does not require* timely commencement, and 42 U. S. C. § 1997e(a), which expressly requires exhaustion of available administrative remedies with no reference to a federally based limiting principle.

Section 706(e) of Title VII is also fundamentally different from the PLRA exhaustion provision. As interpreted by this Court, § 706(e) means that a complainant who "initially institutes proceedings with a state or local agency with authority to grant or seek relief from the practice charged" must "file a charge" with that agency, or "have the EEOC refer the charge to that agency, within 240 days of the alleged discriminatory event . . . ." *EEOC* v. *Commercial Office Products Co.*, 486 U. S. 107, 110–111 (1988). Following the reasoning of *Oscar Mayer*, we held that this filing requirement did not demand that the charge submitted to the state or local authority be filed in compliance with the authority's time limit. 486 U. S., at 123–125. Because § 706(e) of Title VII refers only to the filing of a charge with a state or local agency and not to the exhaustion of remedies, § 706(e) cannot be viewed as a model for the PLRA exhaustion provision.

IV

Respondent's remaining arguments regarding the interpretation of 42 U. S. C. § 1997e(a) are unconvincing. Relying on the use of the term "until" in the phrase "until such administrative remedies as are available are exhausted," respondent contends that "[t]he use of the temporal word 'until' . . . conveys a timing requirement: it assumes that the question to be answered is simply whether the prisoner can file suit now or must wait until later." Brief for Respondent 11.

Likewise, according to respondent, the use of the present tense ("such administrative remedies as *are* available," § 1997e(a) (emphasis added)) requires "a focus on whether any administrative remedies are *presently* available." *Id.*, at 12. But saying that a party may not sue in federal court *until* the party first *pursues* all available avenues of administrative review necessarily means that, if the party never pursues all available avenues of administrative review, the person will never be able to sue in federal court. Thus, § 1997e(a)'s use of the term "until" and the present tense does not support respondent's position.

Respondent attaches significance to the fact that the PLRA exhaustion provision does not expressly state that a prisoner must have "properly exhausted" available administrative remedies, whereas a tolling provision of the AEDPA provides that the time for filing a federal habeas petition is tolled during the period when "a *properly filed* application for State post-conviction or other collateral review . . . is pending." 28 U. S. C. § 2244(d)(2) (emphasis added). In our view, respondent draws an unreasonable inference from the difference in the wording of these two provisions. Although the AEDPA and the PLRA were enacted at roughly the same time, they are separate and detailed pieces of legislation. Moreover, the AEDPA and PLRA provisions deal with separate issues: tolling in the case of the AEDPA and exhaustion in the case of the PLRA.

Respondent maintains that his interpretation of the PLRA exhaustion provision is bolstered by another PLRA provision, 42 U. S. C. § 1997e(c)(2), that permits a district court to dismiss certain prisoner claims "without first requiring the exhaustion of administrative remedies." According to respondent, this provision shows that Congress thought that, at the point when a district court might make such a ruling (which would typically be well after the filing of the complaint), a prisoner might still have the opportunity to exhaust administrative remedies. Because short administrative fil-

ing deadlines would make this impossible, respondent contends, Congress cannot have thought that a prisoner's failure to comply with those deadlines would preclude litigation in federal court.

Respondent's argument is unconvincing for at least two reasons. First, respondent has not shown that Congress had reason to believe that every prison system would have relatively short and categorical filing deadlines. Indeed, respondent asserts that most grievance systems give administrators the discretion to hear untimely grievances. Second, even if dismissals under § 1997e(c)(2) typically occur when the opportunity to pursue administrative remedies has passed, § 1997e(c)(2) still serves a useful function by making it clear that the PLRA exhaustion requirement is not jurisdictional, and thus allowing a district court to dismiss plainly meritless claims without first addressing what may be a much more complex question, namely, whether the prisoner did in fact properly exhaust available administrative remedies.[5]

Respondent next argues that the similarity between the wording of the PLRA exhaustion provision and the AEDPA exhaustion provision, 28 U. S. C. § 2254(c), shows that the PLRA provision was meant to incorporate the narrow technical definition of exhaustion that applies in habeas. We reject this argument for two reasons.

First, there is nothing particularly distinctive about the wording of the habeas and PLRA exhaustion provisions. They say what any exhaustion provision must say—that a judicial remedy may not be sought or obtained unless, until,

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[5] Questions regarding the timeliness of prisoner filings occur frequently. See, *e. g.*, *Wallace* v. *Burbury*, 305 F. Supp. 2d 801, 806 (ND Ohio 2003); *Pusey* v. *Belanger*, No. Civ.02–351–SLR, 2004 WL 2075472 (D. Del., Sept. 14, 2004); *Eakle* v. *Tennis*, No. Civ. 4:CV–04–2040, 2005 WL 2266270 (MD Pa., Sept. 16, 2005); *Williams* v. *Briley*, No. 04 C 5701, 2005 WL 1498865 (ND Ill., June 21, 2005); *Isaac* v. *Nix*, No. Civ.A.2:04CV172RWS, 2006 WL 861642 (ND Ga., Mar. 30, 2006).

or before certain other remedies are exhausted. It is, therefore, unrealistic to infer from the wording of the PLRA provision that Congress framed and adopted that provision with habeas law and not administrative law in mind. Indeed, the wording of the PLRA provision (a prisoner may not bring an action with respect to prison conditions "*until such administrative remedies as are available are exhausted*") is strikingly similar to our description of the doctrine of administrative exhaustion ("'no one is entitled to judicial relief for a supposed or threatened injury *until the prescribed administrative remedy has been exhausted,*'" *McKart*, 395 U. S., at 193 (emphasis added)).

Second, respondent's suggestion that the PLRA was meant to incorporate the same technical distinction that exists in habeas law without providing *any* sanction to prevent willful noncompliance—not even the deliberate bypass standard of *Fay*—would produce a scheme that in practical terms is radically different from the habeas scheme. Copying habeas' narrow definition of exhaustion without furnishing any sanction to promote compliance would be like copying the design for an airplane but omitting one of the wings.

Respondent contends that requiring proper exhaustion will lead prison administrators to devise procedural requirements that are designed to trap unwary prisoners and thus to defeat their claims. Respondent does not contend, however, that anything like this occurred in his case, and it is speculative that this will occur in the future. Corrections officials concerned about maintaining order in their institutions have a reason for creating and retaining grievance systems that provide—and that are perceived by prisoners as providing—a meaningful opportunity for prisoners to raise meritorious grievances. And with respect to the possibility that prisons might create procedural requirements for the purpose of tripping up all but the most skillful prisoners, while Congress repealed the "plain, speedy, and effective" standard, see 42 U. S. C. § 1997e(a)(1) (1994 ed.) (repealed

1996), we have no occasion here to decide how such situations might be addressed.

Respondent argues that requiring proper exhaustion is harsh for prisoners, who generally are untrained in the law and are often poorly educated. This argument overlooks the informality and relative simplicity of prison grievance systems like California's, as well as the fact that prisoners who litigate in federal court generally proceed *pro se* and are forced to comply with numerous unforgiving deadlines and other procedural requirements.

* * *

For these reasons, we reverse the judgment of the Court of Appeals for the Ninth Circuit and remand the case for proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, concurring in the judgment.

I agree with the Court that, in enacting the Prison Litigation Reform Act (PLRA), 42 U. S. C. § 1997e(a), Congress intended the term "exhausted" to "mean what the term means in administrative law, where exhaustion means proper exhaustion." *Ante*, at 93. I do not believe that Congress desired a system in which prisoners could elect to bypass prison grievance systems without consequences. Administrative law, however, contains well-established exceptions to exhaustion. See *Sims* v. *Apfel*, 530 U. S. 103, 115 (2000) (BREYER, J., joined by Rehnquist, C. J., and SCALIA and KENNEDY, JJ., dissenting) (constitutional claims); *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U. S. 1, 13 (2000) (futility); *McKart* v. *United States*, 395 U. S. 185, 197–201 (1969) (hardship); *McCarthy* v. *Madigan*, 503 U. S. 140, 147–148 (1992) (inadequate or unavailable administrative remedies); see generally II R. Pierce, Administrative Law Treatise § 15 (4th ed. 2002). Moreover, habeas corpus law, which contains an exhaustion requirement that is "substantively

similar" to administrative law's and which informs the Court's opinion, *ante*, at 92–93, also permits a number of exceptions. See *post*, at 109, n. 5 (STEVENS, J., dissenting) (noting that habeas corpus law permits "petitioners to overcome procedural defaults if they can show that the procedural rule is not firmly established and regularly followed, if they can demonstrate cause and prejudice to overcome a procedural default, or if enforcing the procedural default rule would result in a miscarriage of justice" (citation omitted)).

At least two Circuits that have interpreted the statute in a manner similar to that which the Court today adopts have concluded that the PLRA's proper exhaustion requirement is not absolute. See *Spruill* v. *Gillis*, 372 F. 3d 218, 232 (CA3 2004); *Giano* v. *Goord*, 380 F. 3d 670, 677 (CA2 2004). In my view, on remand, the lower court should similarly consider any challenges that respondent may have concerning whether his case falls into a traditional exception that the statute implicitly incorporates.

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

The citizen's right to access an impartial tribunal to seek redress for official grievances is so fundamental and so well established that it is sometimes taken for granted. A state statute that purported to impose a 15-day period of limitations on the right of a discrete class of litigants to sue a state official for violation of a federal right would obviously be unenforceable in a federal court. The question in this case is whether, by enacting the exhaustion requirement in the Prison Litigation Reform Act of 1995 (PLRA), Congress intended to authorize state correction officials to impose a comparable limitation on prisoners' constitutionally protected right of access to the federal courts. The text of the statute, particularly when read in the light of our well-settled jurisprudence, provides us with the same unambiguous negative answer that common sense would dictate.

I

Congress enacted the following exhaustion requirement in the PLRA:

> "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U. S. C. § 1997e(a).

This provision requires prisoners to exhaust informal remedies before filing a lawsuit under federal law. They must file an administrative grievance and, if the resolution of that grievance is unsatisfactory to them, they must exhaust available administrative appeals. The statute, however, says nothing about the reasons why a grievance may have been denied; it does not distinguish between a denial on the merits and a denial based on a procedural error. It does not attach any significance to a prison official's decision that a prisoner has made procedural missteps in exhausting administrative remedies. In the words of federal courts jurisprudence, the text of the PLRA does not impose a sanction of waiver or procedural default upon those prisoners who make such procedural errors. See *Engle* v. *Isaac*, 456 U. S. 107, 125–126, n. 28 (1982) (explaining that "the problem of waiver is separate from the question whether a state prisoner has exhausted state remedies").[1] The plain text of the PLRA simply requires that "such administrative remedies as are available" be exhausted before the prisoner can take the se-

[1] Because we have used the term "waiver" in referring to this sanction in the habeas corpus context, I use that term in this opinion. Strictly speaking, it would be more accurate to characterize this sanction as a "forfeiture" sanction, as there is no question that prisoners do not, by making a procedural error in the course of exhausting administrative remedies, purposefully relinquish their right to bring constitutional claims in federal court.

rious step of filing a federal lawsuit against the officials who hold him in custody.

Today, however, the Court concludes that the "PLRA exhaustion requirement requires proper exhaustion," *ante*, at 93. The absence of textual support for that conclusion is a sufficient reason for rejecting it. Unlike 28 U. S. C. § 2244(d)(2), a tolling provision of the Antiterrorism and Effective Death Penalty Act of 1996, which was signed into law just two days before the PLRA, 42 U. S. C. § 1997e(a) lacks any textual requirement of *proper* exhaustion. See *Artuz* v. *Bennett*, 531 U. S. 4, 8 (2000) (explaining the importance of the textual requirement that an application be "*properly* filed" under 28 U. S. C. § 2244(d)(2)). Instead, just as in the habeas context, under the PLRA a prisoner "who has [procedurally] defaulted his federal claims in [a state prison grievance proceeding] meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." *Coleman* v. *Thompson*, 501 U. S. 722, 732 (1991). Accordingly, under the plain text of 42 U. S. C. § 1997e(a), respondent satisfied his duty to exhaust available administrative remedies before filing a federal lawsuit.

II

The majority essentially ignores the PLRA's text,[2] suggesting instead that general administrative law principles, which allow courts in certain circumstances to impose proce-

[2] The majority does not claim that the plain language of the statute dictates its decision, but rather that the text "strongly suggests" that the PLRA includes a procedural default sanction, *ante*, at 93. The majority then states: "Section 1997e(a) refers to 'such administrative remedies as are available,' and thus points to the doctrine of exhaustion in administrative law." *Ibid.* The reference to "administrative remedies" simply addresses the fact that the review procedures provided by prison officials are administrative in character rather than judicial. At any rate, as discussed in Part III, *infra*, the doctrine of exhaustion in administrative law does not support the majority's engraftment of a procedural default sanction into the PLRA.

dural default sanctions as a matter of federal common law, suggest we should read waiver into the PLRA. However, as discussed in Part III, *infra*, our cases make clear that such extratextual waiver sanctions are only appropriate if a statute directs a federal court to act as an appellate tribunal directly reviewing the decision of a federal agency. Because actions brought under Rev. Stat. § 1979, 42 U. S. C. § 1983, such as respondent's, are *de novo* proceedings in federal district court, the majority's invocation of these common-law principles is seriously misguided.

The majority's disregard of the plain text of the PLRA is especially unjustified in light of the backdrop against which the statute was enacted. We presume, of course, that Congress is familiar with this Court's precedents and expects its legislation to be interpreted in conformity with those precedents. See, *e. g.*, *Edelman* v. *Lynchburg College*, 535 U. S. 106, 117, n. 13 (2002); *Porter* v. *Nussle*, 534 U. S. 516, 528 (2002); *North Star Steel Co.* v. *Thomas*, 515 U. S. 29, 34 (1995). This strong presumption is even more forceful when the underlying precedent is "'unusually important.'" *Gebser* v. *Lago Vista Independent School Dist.*, 524 U. S. 274, 294, n. 1 (1998) (quoting *Cannon* v. *University of Chicago*, 441 U. S. 677, 699 (1979)). Consistent with this presumption, if we have already provided a definitive interpretation of the language in one statute, and Congress then uses nearly identical language in another statute, we will give the language in the latter statute an identical interpretation unless there is a clear indication in the text or legislative history that we should not do so. See, *e. g.*, *United States* v. *Wells*, 519 U. S. 482, 495 (1997). Under these elementary principles of statutory interpretation, the PLRA's exhaustion requirement does not incorporate a procedural default component.

As the Solicitor General correctly points out in his brief supporting petitioners, "the PLRA's exhaustion provision is essentially identical to that of the habeas corpus statute." Brief for United States as *Amicus Curiae* 13. Specifically,

a provision in the federal habeas statute, first enacted in 1948 as a codification of a previous judge-made rule,[3] bars relief "unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State," 28 U. S. C. § 2254(b)(1)(A).[4] The PLRA similarly bars judicial relief "until such administrative remedies as are available are exhausted," 42 U. S. C. § 1997e(a). The only noteworthy distinction between the two provisions is that 28 U. S. C. § 2254(b)(1)(A) uses the word "unless," whereas 42 U. S. C. § 1997e(a) uses the word "until." If anything, this distinction suggests that the exhaustion requirement in the PLRA is less amenable to a waiver sanction than the comparable requirement in the habeas statute: The word "until" indicates a temporal condition whereas the word "unless" would have been more appropriate for a procedural bar.

Notwithstanding the use of the word "unless" in 28 U. S. C. § 2254(b)(1)(A), as the majority correctly recognizes, we have held that state-court remedies are "exhausted" for the purposes of the federal habeas statute so long as "they are no longer available, regardless of the reason for their unavailability," *ante*, at 92–93. In other words, the exhaustion requirement in the federal habeas statute does *not* incorporate a procedural default sanction.[5]

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[3] See generally *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 850–853 (1999) (STEVENS, J., joined by GINSBURG and BREYER, JJ., dissenting) (tracing history of exhaustion requirement in habeas law).

[4] This language is, in relevant part, identical to the language as it was enacted in 1948. See 62 Stat. 967.

[5] In habeas law it is a separate judge-made doctrine of procedural default, stemming from our decision in *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), that may bar relief even though a claim has been exhausted. This procedural default doctrine is based on unique considerations of comity in the habeas context, including the need to ensure that the state criminal trial remains the "main event" rather than a "tryout on the road" for a later federal habeas proceeding. *Id.*, at 90 (internal quotation marks omitted). Moreover, procedural default in habeas is closely related to the principle that this Court lacks certiorari jurisdiction to review a state-court judgment that rests on an adequate and independent state proce-

Between Congress' codification of the exhaustion requirement in federal habeas law and Congress' adoption of an essentially identical exhaustion requirement in the PLRA, we decided no fewer than six cases in which we stated explicitly that a habeas petitioner satisfies the statutory exhaustion requirement so long as state-court remedies are no longer available to him at the time of the federal-court filing, regardless of the reason for their unavailability. See *Coleman*, 501 U. S., at 731; *Castille* v. *Peoples*, 489 U. S. 346, 351 (1989); *Teague* v. *Lane*, 489 U. S. 288, 298 (1989); *Engle*, 456 U. S., at 125, n. 8; *Humphrey* v. *Cady*, 405 U. S. 504, 516 (1972); *Fay* v. *Noia*, 372 U. S. 391, 434–435 (1963).

The Court rejects the obvious analogy to habeas law because the wording of the PLRA's exhaustion provision is also "strikingly similar to our description of the doctrine of administrative exhaustion ('"no one is entitled to judicial relief for a supposed or threatened injury *until the prescribed ad-*

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dural ground. See *id.*, at 81–82. It is undisputed that these unique considerations do not apply in the context of 42 U. S. C. § 1983 suits, because the "very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972). Accordingly, the majority correctly does not suggest that we incorporate our procedural default jurisprudence from the federal habeas context into prison conditions suits under § 1983.

Nonetheless, I fear that the majority's analysis may actually create a harsher procedural default regime under the PLRA than the judge-made procedural default doctrine in habeas law. But see *Muhammad* v. *Close*, 540 U. S. 749, 751 (2004) *(per curiam)* (stating that "[p]risoners suing under § 1983 . . . generally face a substantially lower gate [than prisoners seeking habeas corpus relief], even with the requirement of the Prison Litigation Reform Act of 1995 that administrative opportunities be exhausted first" (citing 42 U. S. C. § 1997e(a))). Our habeas jurisprudence allows petitioners to overcome procedural defaults if they can show that the procedural rule is not firmly established and regularly followed, see *James* v. *Kentucky*, 466 U. S. 341, 348 (1984), if they can demonstrate cause and prejudice to overcome a procedural default, or if enforcing the procedural default rule would result in a miscarriage of justice, see *Murray* v. *Carrier*, 477 U. S. 478 (1986).

ministrative remedy has been exhausted"')," *ante*, at 102 (quoting *McKart* v. *United States*, 395 U. S. 185, 193 (1969), in turn citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51 (1938)). The language quoted by the majority from our case law is indeed similar to the language of the PLRA (and the habeas corpus statute). But this provides no help to the majority: We clearly used this language to describe only an exhaustion requirement, not a procedural default sanction.

The quoted language originally appeared in Justice Brandeis' opinion in *Myers*, 303 U. S., at 50–51. *Myers* is a simple exhaustion case: The question presented was whether an employer could seek the immediate intervention of federal courts in response to a complaint filed with the National Labor Relations Board that it had engaged in unfair labor practices, or whether it had to await the conclusion of the Board's proceedings to avail itself of judicial review. The case was purely about timing—there was no discussion whatever of procedural default.

McKart clearly recognized that the language of *Myers* concerned only exhaustion, not procedural default. Immediately after quoting *Myers*, the *McKart* Court discussed the benefits of exhaustion (primarily avoiding premature interruption of the agency process), and drew an analogy to judicial rules that limit interlocutory appeals, without making any reference to procedural default. See 395 U. S., at 193–194. It was not until later in the opinion that the *McKart* Court turned to a discussion of the considerations underlying the imposition of a procedural default sanction in cases "where the administrative process is at an end and a party seeks judicial review of a decision that was not appealed through the administrative process." *Id.*, at 194.

In sum, the language the majority quotes from *McKart* further supports the presumption that Congress intended the exhaustion requirement in the PLRA to be read in conformity with our decisions interpreting the exhaustion re-

quirement in the federal habeas statute—that is, to require exhaustion, but not to impose a waiver sanction for procedural errors made in the course of exhaustion.

III

Absent any support for a procedural default sanction in the text of the PLRA, the Court turns to background principles of administrative law in an effort to justify its holding. See *ante*, at 89–91. The Court's discussion of these background administrative law principles misapprehends our precedent.

As a general rule in the administrative law context, courts should not "'topple over administrative decisions unless the administrative body has not only erred, *but has erred against objection made at the appropriate time under its practice.*'" *Ante*, at 90 (quoting *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 37 (1952)). This doctrine is, "like most judicial doctrines, subject to numerous exceptions. Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." *McKart*, 395 U. S., at 193 (footnote omitted); see *id.*, at 198–201 (declining to apply waiver doctrine in the circumstances of the case before it).

The waiver doctrine in administrative law is "largely [a] creatur[e] of statute." *Sims* v. *Apfel*, 530 U. S. 103, 107 (2000). In other words, many statutes explicitly prohibit courts from considering claims "'that ha[ve] not been urged'" before the administrative agency. *Id.*, at 108 (quoting National Labor Relations Act, 29 U. S. C. § 160(e) (1982 ed.)). See *L. A. Tucker Truck Lines*, 344 U. S., at 36, n. 6 (collecting statutes). It is important to emphasize that statutory waiver requirements always mandate, by their plain terms, that courts shall not consider arguments not properly raised before the agency; we have never suggested that the word "exhaustion," standing alone, imposes a statutory waiver requirement. Accordingly, the Court's claim

that a procedural default sanction is mandated by simply "interpreting and applying the statutory requirement set out in the PLRA exhaustion provision," *ante*, at 91, n. 2, is patently erroneous.

In the federal administrative law context we have also imposed waiver requirements even in the absence of explicit statutory directive. This judge-made rule, discussed extensively by the majority, see *ante*, at 88–91, however, is based on "an analogy to the rule that appellate courts will not consider arguments not raised before trial courts." *Sims*, 530 U. S., at 108–109. As *amici curiae* law professors explain, this is because, in the context of such appellate review proceedings, procedural errors in the course of exhaustion naturally create bars to review because the decision under review rests on a procedural ground. Brief for Law Professors 1. Moreover, the rule that appellate tribunals will not consider claims not properly exhausted below prevents parties from being unfairly surprised on appeal by resolution of issues about which they lacked an opportunity or incentive to introduce evidence at trial. See *Sims*, 530 U. S., at 109. Accordingly, whether a court should impose a procedural default sanction for issues not properly exhausted in a prior administrative proceeding "depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Ibid.* (citing *L. A. Tucker Truck Lines* and *Hormel* v. *Helvering*, 312 U. S. 552 (1941)). If the analogy does not hold, we will not impose a procedural default sanction. See *Sims*, 530 U. S., at 108–110.[6]

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[6]The majority's attempt to distinguish *Sims* as concerning "different questions," *ante*, at 91, n. 2, is perplexing, particularly in light of the fact that the United States, in its brief supporting petitioners, relies on *Sims* to argue that our administrative law decisions support the proposition that the Court should impose a waiver sanction into the PLRA. See Brief for United States as *Amicus Curiae* 11. Although the particular procedural error made during the exhaustion of administrative remedies was different in *Sims* than the procedural error at issue here, our analysis in *Sims*

Applying these principles, it is clear that ordinary principles of administrative law do not justify engrafting procedural default into the PLRA. The purpose of a 42 U. S. C. § 1983 action such as that filed by respondent is not to obtain direct review of an order entered in the grievance procedure, but to obtain redress for an alleged violation of federal law committed by state corrections officials. See, *e. g.*, *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972). It is undisputed that the PLRA does nothing to change the nature of the federal action under § 1983; prisoners who bring such actions after exhausting their administrative remedies are entitled to *de novo* proceedings in the federal district court without any deference (on issues of law or fact) to any ruling in the administrative grievance proceedings. In sum, because federal district court proceedings in prison condition litigation bear no resemblance to appellate review of lower court decisions, the administrative law precedent cited by the majority makes clear that we should not engraft a judge-made procedural default sanction into the PLRA.[7] The majority's misapprehension of our precedent is especially troubling because, as the American Bar Association points out, we should be particularly hesitant to impose "judicially-created procedural technicalities . . . 'in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.'"

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concerned the circumstances under which we should or should not engraft a waiver sanction into the administrative exhaustion process generally. See 530 U. S., at 108–112; *id.*, at 112–113 (O'Connor, J., concurring in part and concurring in judgment); *id.*, at 114–115 (BREYER, J., dissenting).

[7] The majority's suggestion that habeas law indicates otherwise, see *ante*, at 91–92, n. 2, is incorrect. As explained above, see n. 5, *supra*, the judge-made procedural default sanction in habeas law is based on unique considerations that do not apply to § 1983 suits. Our precedent concerning judicial review of administrative proceedings, upon which the majority purports to rely, see *ante*, at 93, makes clear that we will not impose a waiver sanction when judicial review of the administrative decision does not resemble appellate review of lower court decisions.

Brief as *Amicus Curiae* 11 (quoting *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 765, n. 13 (1979)).[8]

Finally, the majority's invocation of judge-made administrative law principles fails for an entirely separate reason: An "established exception" to the judge-made doctrine of procedural default in review of administrative proceedings permits individuals to raise constitutional complaints for the first time in federal court, even if they failed to raise those claims properly before the agency. *Sims*, 530 U. S., at 115 (BREYER, J., joined by Rehnquist, C. J., and SCALIA and KENNEDY, JJ., dissenting) (citing *Mathews* v. *Eldridge*, 424 U. S. 319, 329, n. 10 (1976)). Because respondent has raised constitutional claims, under our precedent, the Court may not, as a matter of federal common law, apply an extrastatutory waiver requirement against him.

IV

The principal arguments offered by the Court in support of its holding are policy arguments that, in its view, are grounded in the purposes of the PLRA.[9] The majority correctly identifies two of the principal purposes of the PLRA: (1) affording corrections officials time and opportunity to address complaints internally before the initiation of a federal lawsuit; and (2) reducing the quantity, and improving the quality, of prison litigation. Both of these purposes would

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[8] The majority notes that many prisoners proceed *pro se* in federal court, where there are also time limits and other procedural requirements. See *ante*, at 102. However, the timeliness and other procedural requirements of prison grievance systems are generally far more stringent than those imposed by federal courts. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 6, n. 1, 25–27; Brief for Jerome N. Frank Legal Services Organization of Yale Law School as *Amicus Curiae* A1–A7.

[9] Of course, if the majority were serious that "what matters is not whether proper exhaustion was necessary to reach [policy goals], but whether proper exhaustion was mandated by Congress," *ante*, at 94, n. 4, its opinion would not rest almost entirely on policy arguments.

be served by the PLRA, even if the Court did not engraft a procedural default sanction into the statute.

The first policy concern identified by the majority does not even arguably justify either a timeliness requirement or a procedural default sanction. Prison officials certainly have the opportunity to address claims that were filed in some procedurally defective manner; indeed, California, like the vast majority of state prison systems, explicitly gives prison administrators an opportunity to hear untimely or otherwise procedurally defective grievances. Cal. Code Regs., tit. 15, § 3084.3(c). See generally Roosevelt, Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error, 52 Emory L. J. 1771, 1810, and n. 192 (2003) (hereinafter Roosevelt). Because it is undisputed that the PLRA mandates that prisoners exhaust their administrative remedies before filing a federal lawsuit, prison officials will have the opportunity to address prisoners' claims before a suit is filed.[10]

Second, the PLRA has already had the effect of reducing the quantity of prison litigation, without the need for an extrastatutory procedural default sanction. As petitioners themselves point out, the number of civil rights suits filed by prisoners in federal court dropped from 41,679 in 1995 to 25,504 in 2000, and the rate of prisoner filing dropped even more dramatically during that period, from 37 prisoner suits per 1,000 inmates to 19 suits per 1,000 inmates. By contrast, between 2000 and 2004, the rate of filing remained relatively constant, dropping only "slight[ly]" to approximately 16 suits per 1,000 inmates. See Brief for Petitioners 21–22. The

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[10] In this regard, the majority's reference to *Coleman* v. *Thompson*, 501 U. S. 722, 735, n. (1991), see *ante*, at 96, is perplexing. If a prison regulation explicitly grants prison officials discretion to consider untimely or otherwise procedurally defective grievances, of course prison grievance remedies would still be "available," and thus unexhausted, if a prisoner had not even tried to file a grievance simply because it was untimely or otherwise procedurally defective.

sharp drop in prison litigation between 1995 and 2000 occurred *before* the Seventh Circuit's opinion in *Pozo* v. *McCaughtry*, 286 F. 3d 1022 (2002), which was the first appellate decision engrafting a procedural default sanction into the PLRA. Prior to *Pozo*, the federal courts had regularly assumed that the PLRA did not create any procedural default sanction, and dismissals for failure to exhaust were without prejudice. See Roosevelt 1780–1781 (discussing cases). Thus, the PLRA, including its simple exhaustion requirement, was sufficient to reduce the quantity of prisoner suits without any procedural default requirement. This is not surprising: Because the exhaustion requirement always ensures that prison officials have an opportunity to address claims brought by prisoners before a federal lawsuit, some prisoners will be "successful in the administrative process, and others are persuaded by the proceedings not to file an action in federal court," *ante*, at 94, in part because "the very fact of being heard . . . can mollify passions," *Booth* v. *Churner*, 532 U. S. 731, 737 (2001).[11]

Ordinary exhaustion also improves the quality of prisoner suits. By giving prison officials an opportunity to address a prisoner's grievance before the initiation of the lawsuit, ordinary exhaustion "often results in the creation of an administrative record that is helpful to the court," *ante*, at 95.[12]

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[11] Without any support, the majority speculates that the drop in suits filed by prisoners between 1995 and 2000 resulted from other provisions of the PLRA. See *ante*, at 94, n. 4. Regardless, the aforementioned statistics demonstrate that the procedural default sanction imposed by the PLRA is unnecessary to reduce the quantity of prison litigation.

[12] The majority also argues that ensuring strict compliance with strict prison timeliness requirements (generally ranging from 48 hours to a month, see n. 15, *infra*) will improve the quality of prisoner litigation because if "a grievance is filed shortly after the event giving rise to the grievance, witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved." *Ante*, at 95. While these are advantages to filing grievances soon after the alleged injury occurs, courts regularly resolve § 1983 (and other) litigation without

I acknowledge, of course, that the majority's creation of a waiver sanction for procedural missteps during the course of exhaustion will have an even more significant effect in reducing the number of lawsuits filed by prisoners. However, "no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987) *(per curiam)* (emphasis deleted).

The competing values that Congress sought to effectuate by enacting the PLRA were reducing the number of frivolous filings, on one hand, while preserving prisoners' capacity to file meritorious claims, on the other. As explained by Senator Hatch when he introduced the legislation on the Senate floor, the PLRA was needed because the quantity of frivolous suits filed by prisoners was, in Senator Hatch's view, making it difficult for "courts to consider meritorious claims." 141 Cong. Rec. 27042 (1995). He continued: "Indeed, I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised." *Ibid.* Similarly, as Senator Thurmond, a cosponsor of the bill, stated: "[The PLRA] will allow meritorious claims to be filed, but gives the judge broader discretion to prevent frivolous and malicious lawsuits filed by prison inmates." *Id.*, at 27044.

But the procedural default sanction created by this Court, unlike the exhaustion requirement created by Congress, bars

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such Draconian time limitations. At any rate, as discussed below, legislation does not pursue any one purpose at all costs, and the marginal advantages of encouraging compliance with such short time limitations do not justify judicially rewriting the PLRA's exhaustion requirement by engrafting a procedural default sanction into the statute.

litigation at random, irrespective of whether a claim is meritorious or frivolous.[13] Consider, for example, an inmate who has been raped while in prison. Such a scenario is far from hypothetical; in enacting the Prison Rape Elimination Act of 2003, 42 U. S. C. § 15601 *et seq.* (2000 ed., Supp. III), Congress estimated that some one million people have been sexually assaulted in the Nation's prisons over the last 20 years, § 15601(2). Although not all of these tragic incidents result in constitutional violations, the sovereign does have a constitutional duty to "provide humane conditions of confinement," *Farmer* v. *Brennan*, 511 U. S. 825, 832 (1994). Accordingly, those inmates who are sexually assaulted by guards, or whose sexual assaults by other inmates are facilitated by guards, have suffered grave deprivations of their Eighth Amendment rights. Yet, the Court's engraftment of a procedural default sanction into the PLRA's exhaustion requirement risks barring such claims when a prisoner fails, *inter alia*, to file her grievance (perhaps because she correctly fears retaliation[14]) within strict time requirements that are generally no more than 15 days, and that, in nine States, are between 2 and 5 days.[15]

Much of the majority opinion seems to assume that, absent the creation of a waiver sanction, prisoners will purposely circumvent prison grievance proceedings. However, prisoners generally lack both the incentive and the capacity to en-

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[13] Indeed, if anything, it will have a worse effect on meritorious claims; prisoners who file frivolous claims are probably more likely to be repeat filers, and to learn the ins and outs of all procedural requirements.

[14] See, *e. g.*, *Daskalea* v. *District of Columbia*, 227 F. 3d 433, 437, 439 (CADC 2000) (discussing how female prisoner had her underwear confiscated as "'contraband'" and was placed in solitary confinement without a mattress as a result of talking to prison officials about the sexual assaults and harassment to which guards had subjected her).

[15] For a comprehensive discussion of state prison grievance system filing deadlines, see Brief for American Civil Liberties Union et al. as *Amici Curiae* 6, n. 1, and Brief for Jerome N. Frank Legal Services Organization of Yale Law School as *Amicus Curiae* A1–A7.

gage in such evasive tactics. Because federal courts do not provide any deference to administrative decisions by prison officials and any later federal suit is *de novo*, prisoners—even prisoners who are acting in bad faith—lack an incentive to avoid filing an administrative grievance unless they fear retaliation. Moreover, because prisoners must exhaust administrative remedies, prison officials can always thwart efforts by prisoners to avoid the grievance process by simply exercising their discretion to excuse any procedural defect in the presentation of the prisoners' claims.

At any rate, there is a simple solution that would allow courts to punish prisoners who seek to deliberately bypass state administrative remedies, but that would not impose the Draconian punishment of procedural default on prisoners who make reasonable, good-faith efforts to comply with relevant administrative rules but, out of fear of retaliation, a reasonable mistake of law, or simple inadvertence, make some procedural misstep along the way. Federal courts could simply exercise their discretion to dismiss suits brought by the former group of litigants but not those brought by the latter.

The majority argues that imposing a sanction against prisoners who deliberately bypass administrative remedies "neither has a statutory basis nor refers to a concept of exhaustion from an existing body of law," *ante*, at 98. In fact, this criticism applies to the majority's engraftment of an overinclusive procedural default sanction into the PLRA. If this Court insists upon rewriting § 1997e(a) in light of its understanding of the statute's purposes, surely the majority should add to the statute no harsher a sanction for making a procedural error during exhaustion than is necessary to accomplish its policy goals.

Moreover, ordinary abstention principles allow federal district courts to dismiss suits brought by prisoners who have deliberately bypassed available state remedies. Federal courts have the power to decline jurisdiction in exceptional

circumstances, including the need to promote "wise judicial administration." *Quackenbush* v. *Allstate Ins. Co.*, 517 U. S. 706, 716 (1996) (internal quotation marks omitted). Indeed, in *Fay*, we emphasized the discretion of district court judges in embracing precisely such a deliberate bypass regime in the habeas corpus statute. See 372 U. S., at 438. Applying such a deliberate bypass sanction to the PLRA would ensure that prisoners who act in bad faith are penalized, while not interfering with the capacity of other inmates to litigate meritorious constitutional claims.

In sum, the version of the PLRA Congress actually enacted, which includes an exhaustion requirement but not a procedural default sanction, is plainly sufficient to advance the policy values identified by the Court. Moreover, if, as the Court worries, there are many prisoners who act in bad faith and purposely eschew administrative remedies, the imposition of a deliberate bypass standard would resolve that problem, without depriving litigants who act in good faith but nonetheless make a procedural error from obtaining judicial relief relating to their valid constitutional claims. The majority's holding is as unsupported by the policy concerns it discusses as it is by the text of the statute.

V

The majority leaves open the question whether a prisoner's failure to comply properly with procedural requirements that do not provide a "meaningful opportunity for prisoners to raise meritorious grievances" would bar the later filing of a suit in federal court. *Ante*, at 102. What the majority has in mind by a "meaningful opportunity" is unclear, and this question is sure to breed a great deal of litigation in federal courts in the years to come.

For example, in this case, respondent filed a second grievance after his first grievance was rejected, arguing that his first grievance was in fact timely because he was challenging petitioners' continuing prohibition on his capacity to partici-

pate in Catholic observances, such as Confession, Holy Week services, and Bible study. The prison again rejected this second grievance on timeliness grounds, even though the denial of respondent's capacity to engage in religious activities was clearly ongoing, and thus had occurred within the prison's 15-day statute of limitations. See 403 F. 3d 620, 622 (CA9 2005). Assuming respondent explicitly requested the restoration of his right to engage in religious activities within 15 days of the filing of his second grievance and prison officials denied the request, did petitioners' grievance procedures fail to provide respondent with a "meaningful opportunity" to raise his claim, because, in light of the continuing nature of the injury respondent is challenging, his grievance was in fact timely? Cf. *Klehr* v. *A. O. Smith Corp.*, 521 U. S. 179, 189 (1997) (explaining that, under the Clayton Act, each overt act in the case of a "continuing violation," such as a price-fixing conspiracy, is sufficient to restart the statute of limitations).

What about cases involving other types of procedural missteps? Does a 48-hour limitations period furnish a meaningful opportunity for a prisoner to raise meritorious grievances in the context of a juvenile who has been raped and repeatedly assaulted, with the knowledge and assistance of guards, while in detention? See *Minix* v. *Pazera*, No. 1:04 CV 447 RM, 2005 WL 1799538, *2 (ND Ind., July 27, 2005). Does a prison grievance system provide such a meaningful opportunity when women prisoners fail to file timely grievances relating to a pattern of rape and sexual harassment throughout a city's prisons, because they correctly fear retaliation if they file such complaints? See *Women Prisoners* v. *District of Columbia*, 877 F. Supp. 634 (DC 1994). Are such remedies meaningful when a prisoner files a grievance concerning a prison official having encouraged him to commit suicide, which the prisoner reasonably thinks raises one claim, but which prison officials interpret to raise two separate claims—one related to the guard's comments and one related

to the prisoner's failure to receive health care—and thus dismiss for violating a prison regulation against including more than one claim in a single grievance? See *Harper* v. *Laufenberg*, No. 04–C–699–C, 2005 WL 79009, *3 (WD Wis., Jan. 6, 2005). What if prison officials dismiss a timely filed appeal because the prisoner explains that the prison will take two weeks to finish making certain copies of relevant documents by sending a letter to the Secretary of the Department of Corrections, rather than to the Secretary of Inmate Grievances and Appeals, as he should have under the prison regulations? See *Keys* v. *Craig*, 160 Fed. Appx. 125 (CA3 2005) *(per curiam)*. More generally, are remedies meaningful when prison officials refuse to hear a claim simply because a prisoner makes some hypertechnical procedural error? See *Spruill* v. *Gillis*, 372 F. 3d 218, 232 (CA3 2004) (imposing a procedural default sanction in the PLRA, but stating that compliance with grievance proceedings need only be "'substantial'"); *Giano* v. *Goord*, 380 F. 3d 670, 676–678 (CA2 2004) (stating that failure to comply with procedural requirements in grievance proceedings may be excused based on special circumstances, such as a prisoner's reasonable, but mistaken, understanding of prison regulations).

Depending on the answer to questions like these, the majority's interpretation of the PLRA may cause the statute to be vulnerable to constitutional challenges. "[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 741 (1983). Accordingly, the Constitution guarantees that prisoners, like all citizens, have a reasonably adequate opportunity to raise constitutional claims before impartial judges, see, *e. g.*, *Lewis* v. *Casey*, 518 U. S. 343, 351 (1996). Moreover, because access to the courts is a fundamental right, see *id.*, at 346, government-drawn classifications that impose substantial burdens on the capacity of a group of citizens to exercise that right require searching judicial examination

under the Equal Protection Clause, see, *e. g.*, *Lyng* v. *Automobile Workers*, 485 U. S. 360, 370 (1988).

The correct interpretation of the PLRA would obviate the need for litigation over any of these issues. More importantly, the correct interpretation of the statute would recognize that, in enacting the PLRA, Members of Congress created a rational regime designed to reduce the quantity of frivolous prison litigation while adhering to their constitutional duty "to respect the dignity of all persons," even "those convicted of heinous crimes." *Roper* v. *Simmons*, 543 U. S. 551, 560 (2005). Because today's decision ignores that duty, I respectfully dissent.

Syllabus

LABORATORY CORPORATION OF AMERICA HOLDINGS, DBA LABCORP *v.* METABOLITE LABORATORIES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 04–607. Argued March 21, 2006—Decided June 22, 2006

Certiorari dismissed. Reported below: 370 F. 3d 1354.

Jonathan S. Franklin argued the cause for petitioner. With him on the briefs were *Catherine E. Stetson* and *Jessica L. Ellsworth.*

Deputy Solicitor General Hungar argued the cause for the United States as *amicus curiae.* With him on the brief were *Solicitor General Clement, Assistant Attorney General Keisler, Daryl Joseffer, Anthony J. Steinmeyer, Jeffrey Clair, John M. Whealan,* and *Stephen Walsh.*

Miguel A. Estrada argued the cause for respondents. With him on the brief were *Glenn K. Beaton, Mark A. Perry, Jeffrey A. Wadsworth,* and *Mark A. Lemley.**

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*Briefs of *amici curiae* urging reversal were filed for Affymetrix, Inc., et al. by *Kathleen M. Sullivan* and *Barbara A. Caulfield;* for the American Clinical Laboratory Association by *Roy T. Englert, Jr.;* for the American Heart Association by *Gregory A. Castanias;* for the American Medical Association et al. by *Jack R. Bierig;* for the Computer & Communications Industry Association by *Jonathan Band;* for the Financial Services Industry by *Donald M. Falk* and *Jeremy Gaston;* and for the People's Medical Society by *Lori B. Andrews* and *Francis C. J. Pizzulli.*

Briefs of *amici curiae* urging affirmance were filed for the Franklin Pierce Law Center by *Craig Steven Jepson;* and for Perlegen Sciences, Inc., et al. by *Gideon A. Schor* and *Meredith E. Kotler.*

Briefs of *amici curiae* were filed for the AARP by *Joshua D. Sarnoff, Sarah Lock, Bruce Vignery,* and *Michael Schuster;* for the American Express Co. by *Abbe David Lowell, Joseph A. Calvaruso, Walter G. Hanchuk, Richard Martinelli,* and *Raymond Millien;* for the American Intellectual Property Law Association by *Denise M. Kettelberger* and *Melvin C. Garner;* for the Association of the Bar of the City of New York by *Peter A. Sullivan* and *Catriona M. Collins;* for the Boston Patent Law

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE SOUTER join, dissenting.

This case involves a patent that claims a process for helping to diagnose deficiencies of two vitamins, folate and cobalamin. The process consists of using any test (whether patented or unpatented) to measure the level in a body fluid of an amino acid called homocysteine and then noticing whether its level is elevated above the norm; if so, a vitamin deficiency is likely.

The lower courts held that the patent claim is valid. They also found the petitioner, Laboratory Corporation of America Holdings (LabCorp), liable for inducing infringement of the claim when it encouraged doctors to order diagnostic tests for measuring homocysteine. The courts assessed damages. And they enjoined LabCorp from using any tests that would lead the doctors it serves to find a vitamin deficiency by taking account of elevated homocysteine levels.

We granted certiorari in this case to determine whether the patent claim is invalid on the ground that it improperly seeks to "claim a monopoly over a basic scientific relationship," Pet. for Cert. i, namely, the relationship between homocysteine and vitamin deficiency. The Court has dis-

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Association by *Mark B. Solomon* and *Doreen M. Hogle;* for the Federal Circuit Bar Association by *Mark P. Walters, Martha B. Schneider, Peter B. Ellis,* and *Claire Laporte;* for the Intellectual Property Owners Association by *Paul H. Berghoff* and *Douglas K. Norman;* for International Business Machines Corp. by *Christopher A. Hughes;* for Patients not Patents, Inc., by *Edward J. Elder;* and for the Public Patent Foundation by *Justin Hughes.*

missed the writ as improvidently granted. In my view, we should not dismiss the writ. The question presented is not unusually difficult. We have the authority to decide it. We said that we would do so. The parties and *amici* have fully briefed the question. And those who engage in medical research, who practice medicine, and who as patients depend upon proper health care might well benefit from this Court's authoritative answer.

I

A

The relevant principle of law "[e]xclude[s] from . . . patent protection . . . laws of nature, natural phenomena, and abstract ideas." *Diamond* v. *Diehr*, 450 U. S. 175, 185 (1981). This principle finds its roots in both English and American law. See, *e. g.*, *Neilson* v. *Harford*, Webster's Patent Cases 295, 371 (1841); *Le Roy* v. *Tatham*, 14 How. 156, 175 (1853); *O'Reilly* v. *Morse*, 15 How. 62 (1854); *The Telephone Cases*, 126 U. S. 1 (1888). The principle means that Einstein could not have "patent[ed] his celebrated law that $E=mc^2$; nor could Newton have patented the law of gravity." *Diamond* v. *Chakrabarty*, 447 U. S. 303, 309 (1980). Neither can one patent "a novel and useful mathematical formula," *Parker* v. *Flook*, 437 U. S. 584, 585 (1978), the motive power of electromagnetism or steam, *Morse*, *supra*, at 116, "the heat of the sun, electricity, or the qualities of metals," *Funk Brothers Seed Co.* v. *Kalo Inoculant Co.*, 333 U. S. 127, 130 (1948).

The justification for the principle does not lie in any claim that "laws of nature" are obvious, or that their discovery is easy, or that they are not useful. To the contrary, research into such matters may be costly and time consuming; monetary incentives may matter; and the fruits of those incentives and that research may prove of great benefit to the human race. Rather, the reason for the exclusion is that sometimes *too much* patent protection can impede rather than "promote the Progress of Science and useful Arts," the constitutional

objective of patent and copyright protection. U. S. Const., Art. I, §8, cl. 8.

The problem arises from the fact that patents do not only encourage research by providing monetary incentives for invention. Sometimes their presence can discourage research by impeding the free exchange of information, for example by forcing researchers to avoid the use of potentially patented ideas, by leading them to conduct costly and time-consuming searches of existing or pending patents, by requiring complex licensing arrangements, and by raising the costs of using the patented information, sometimes prohibitively so.

Patent law seeks to avoid the dangers of overprotection just as surely as it seeks to avoid the diminished incentive to invent that underprotection can threaten. One way in which patent law seeks to sail between these opposing and risky shoals is through rules that bring certain types of invention and discovery within the scope of patentability while excluding others. And scholars have noted that "patent law['s] exclu[sion of] fundamental scientific (including mathematical) and technological principles" (like copyright's exclusion of "ideas") is a rule of the latter variety. W. Landes & R. Posner, The Economic Structure of Intellectual Property Law 305 (2003). That rule reflects "both . . . the enormous potential for rent seeking that would be created if property rights could be obtained in [those basic principles] and . . . the enormous transaction costs that would be imposed on would-be users." *Id.*, at 305–306; cf. *Nichols* v. *Universal Pictures Corp.*, 45 F. 2d 119, 122 (CA2 1930) (L. Hand, J.).

Thus, the Court has recognized that "[p]henomena of nature, though just discovered, mental processes, and abstract intellectual concepts are . . . the basic tools of scientific and technological work." *Gottschalk* v. *Benson*, 409 U. S. 63, 67 (1972). It has treated fundamental scientific principles as "part of the storehouse of knowledge" and manifestations of laws of nature as "free to all men and reserved exclusively

to none." *Funk Bros., supra,* at 130. And its doing so reflects a basic judgment that protection in such cases, despite its potentially positive incentive effects, would too often severely interfere with, or discourage, development and the further spread of useful knowledge itself.

B

In the 1980's three university doctors, after conducting research into vitamin deficiencies, found a correlation between high levels of homocysteine in the blood and deficiencies of two essential vitamins, folate (folic acid) and cobalamin (vitamin B_{12}). They also developed more accurate methods for testing body fluids for homocysteine, using gas chromatography and mass spectrometry. They published their findings in 1985. They obtained a patent. And that patent eventually found its commercial way into the hands of Competitive Technologies, Inc. (CTI), and its licensee Metabolite Laboratories, Inc. (Metabolite), the respondents here.

The patent contains several claims that cover the researchers' new methods for testing homocysteine levels using gas chromatography and mass spectrometry. Supp. App. 30. In 1991, LabCorp (in fact, a corporate predecessor) took a license from Metabolite permitting it to use the tests described in the patent in return for 27.5% of related revenues. Their agreement permitted LabCorp to terminate the arrangement if "a more cost effective commercial alternative is available *that does not infringe a valid and enforceable claim* of" the patent. App. 305 (emphasis added).

Until 1998, LabCorp used the patented tests and paid royalties. By that time, however, growing recognition that elevated homocysteine levels might predict risk of heart disease led to increased testing demand. Other companies began to produce alternative testing procedures. And LabCorp decided to use one of these other procedures—a test devised by Abbott Laboratories that LabCorp concluded was "far superior." *Id.*, at 167 (testimony of Peter Wentz).

LabCorp continued to pay royalties to respondents whenever it used the patented tests. But it concluded that Abbott's test did not fall within the patent's protective scope. And LabCorp consequently refused to pay royalties when it used the Abbott test. *Id.*, at 237 (payment eliminated due to "change in methodology").

In response, respondents brought this suit against LabCorp for patent infringement and breach of the license agreement. They did not claim that LabCorp's use of the Abbott test infringed the patent's claims describing methods for testing for homocysteine. Instead, respondents relied on a broader claim not limited to those tests, namely, claim 13, the sole claim at issue here. That claim—set forth below in its entirety—seeks patent protection for:

> "A method for detecting a deficiency of cobalamin or folate in warm-blooded animals comprising the steps of:
>
> "assaying a body fluid for an elevated level of total homocysteine; and
>
> "correlating an elevated level of total homocysteine in said body fluid with a deficiency of cobalamin or folate." Supp. App. 30.

Claim 13, respondents argued, created a protected monopoly over the process of "correlating" test results and potential vitamin deficiencies. The parties agreed that the words "assaying a body fluid" refer to the use of any test at all, whether patented or not patented, that determines whether a body fluid has an "elevated level of total homocysteine." And at trial, the inventors testified that claim 13's "correlating" step consists simply of a physician's recognizing that a test that shows an elevated homocysteine level—by that very fact—shows the patient likely has a cobalamin or folate deficiency. App. 108–111 (testimony of Dr. Sally Stabler); *id.*, at 137–142, 155–161 (testimony of Dr. Robert Allen). They added that, because the natural relationship between homocysteine and vitamin deficiency was now well known,

such "correlating" would occur automatically in the mind of any competent physician. *Id.*, at 137–138 (same).

On this understanding of the claim, respondents argued, LabCorp was liable for inducing doctors to infringe. More specifically, LabCorp would conduct homocysteine tests and report the results measured in micromoles (millionths of a mole) per liter (symbolized mol/L). Doctors, because of their training, would know that a normal homocysteine range in blood is between 7 and 22 mol/L (and in urine between 1 and 20 mol/L), Supp. App. 14, and would know that an elevated homocysteine level is correlated with a vitamin deficiency. Hence, in reviewing the test results, doctors would look at the mol/L measure and automatically reach a conclusion about whether or not a person was suffering from a vitamin deficiency. Claim 13 therefore covered *every* homocysteine test that a doctor reviewed. And since LabCorp had advertised its tests and educated doctors about the correlation, LabCorp should be liable for actively inducing the doctors' infringing acts. See 35 U. S. C. § 271(b).

The jury found LabCorp liable on this theory. The District Court calculated damages based on unpaid royalties for some 350,000 homocysteine tests performed by LabCorp using the Abbott method. The court also enjoined LabCorp from performing "any homocysteine-only test, including, without limitation homocysteine-only tests via the Abbott method." App. to Pet. for Cert. 36a–37a (internal quotation marks omitted).

LabCorp appealed. It argued to the Federal Circuit that the trial court was wrong to construe claim 13 so broadly that infringement took place "every time a physician does nothing more than look at a patient's homocysteine level." Corrected Brief for Appellant in No. 03–1120 (CA Fed.), p. 28 (hereinafter Brief for Appellant). Indeed, if so construed (rather than construed, say, to cover only *patented* tests), then claim 13 was "invalid for indefiniteness, lack of written

description, non-enablement, anticipation, and obviousness." *Id.*, at 38. LabCorp told the Federal Circuit:

> "If the Court were to uphold this vague claim, anyone could obtain a patent on any scientific correlation—that there is a link between fact A and fact B—merely by drafting a patent claiming no more than 'test for fact A and correlate with fact B' . . . . Claim 13 does no more than that. If it is upheld, CTI would improperly gain a monopoly over a basic scientific fact rather than any novel invention of its own. The law is settled that no such claim should be allowed. *See, e. g., Diamond* v. *Diehr*, 450 U. S. 175, 185 (1981) . . . ; Chisum on Patents § 1.03[6]." *Id.*, at 41.

The Federal Circuit rejected LabCorp's arguments. It agreed with the District Court that claim 13's "correlating" step simply means "relating total homocysteine levels to cobalamin or folate deficiency, a deficiency in both, or a deficiency in neither." 370 F. 3d 1354, 1363 (2004). That meaning, it said, is "discernible and clear"; it is definite, it is described in writing, and it would enable virtually anyone to follow the instruction it gives. And that is sufficient. *Id.*, at 1366–1367. The Court did not address LabCorp's argument that, *if so construed*, claim 13 must be struck down as an improper effort to obtain patent protection for a law of nature.

Moreover, the Circuit concluded, because any competent doctor reviewing test results would automatically correlate those results with the presence or absence of a vitamin deficiency, virtually every doctor who ordered and read the tests was a direct infringer. And because LabCorp "publishes . . . Continuing Medical Education articles" and other pieces, which urge doctors to conduct the relevant tests and to reach a conclusion about whether a patient is suffering from a vitamin deficiency based upon the test results, LabCorp induces

infringement. *Id.*, at 1365. Finally, the court rejected LabCorp's challenge to the injunction. *Id.*, at 1372.

LabCorp filed a petition for certiorari. Question Three of the petition asks "[w]hether a method patent . . . directing a party simply to 'correlat[e]' test results can validly claim a monopoly over a basic scientific relationship . . . such that any doctor necessarily infringes the patent merely by thinking about the relationship after looking at a test result." Pet. for Cert. i. After calling for and receiving the views of the Solicitor General, 543 U. S. 1185 (2005), we granted the petition, limited to Question Three.

II

The question before us is whether claim 13, as construed and applied in the way I have described in Part I–B, is invalid in light of the "law of nature" principle, described in Part I–A. I believe that we should answer that question. There is a technical procedural reason for not doing so, namely, that LabCorp did not refer in the lower courts to § 101 of the Patent Act, which sets forth subject matter that is patentable, and within the bounds of which the "law of nature" principle most comfortably fits. See 35 U. S. C. § 101 (patent may be obtained for "any new and useful process, machine, manufacture, or composition of matter"); *Flook*, 437 U. S., at 588–589. There is also a practical reason for not doing so, namely, that we might benefit from the views of the Federal Circuit, which did not directly consider the question. See, *e. g.*, *United States* v. *Bestfoods*, 524 U. S. 51, 72–73 (1998).

Nonetheless, stronger considerations argue for our reaching a decision. For one thing, the technical procedural objection is tenuous. LabCorp argued the essence of its present claim below. It told the Federal Circuit that claim 13 as construed by the District Court was too "vague" because that construction would allow "anyone" to "obtain a patent on any scientific correlation"; it would permit the respond-

ents "improperly [to] gain a monopoly over a basic scientific fact" despite "settled" law "that no such claim should be allowed." Brief for Appellant 41 (citing *Diehr*, 450 U. S., at 185; 1 D. Chisum, Patents § 1.03[6] (2006 ed.) (hereinafter Chisum)). LabCorp explicitly stated in its petition for certiorari that, "[i]f the Court allows the Federal Circuit opinion to stand . . . [respondents] would improperly gain monopolies over basic scientific facts rather than any novel inventions of their own." Pet. for Cert. 25 (citing *Diehr*, *supra*; *Gottschalk*, 409 U. S. 63; *Funk Bros.*, 333 U. S. 127; *Mackay Radio & Telegraph Co.* v. *Radio Corp. of America*, 306 U. S. 86 (1939)). And after considering the Solicitor General's advice not to hear the case (primarily based upon LabCorp's failure to refer to 35 U. S. C. § 101), we rejected that advice, thereby "necessarily consider[ing] and reject[ing] that contention as a basis for denying review." *United States* v. *Williams*, 504 U. S. 36, 40 (1992).

For another thing, I can find no good practical reason for refusing to decide the case. The relevant issue has been fully briefed and argued by the parties, the Government, and 20 *amici*. The record is comprehensive, allowing us to learn the precise nature of the patent claim, to consider the commercial and medical context (which the parties and *amici* have described in detail), and to become familiar with the arguments made in all courts. Neither the factual record nor the briefing suffers from any significant gap. No party has identified any prejudice due to our answering the question. And there is no indication that LabCorp's failure to cite § 101 reflected unfair gamesmanship.

Of course, further consideration by the Federal Circuit might help us reach a better decision. Lower court consideration almost always helps. But the thoroughness of the briefing leads me to conclude that the extra time, cost, and uncertainty that further proceedings would engender are not worth the potential benefit.

Finally, I believe that important considerations of the public interest—including that of clarifying the law in this area sooner rather than later—argue strongly for our deciding the question presented now. See Part IV, *infra*.

III

I turn to the merits. The researchers who obtained the present patent found that an elevated level of homocysteine in a warmblooded animal is correlated with folate and cobalamin deficiencies. As construed by the Federal Circuit, claim 13 provides those researchers with control over doctors' efforts to use that correlation to diagnose vitamin deficiencies in a patient. Does the law permit such protection or does claim 13, in the circumstances, amount to an invalid effort to patent a "phenomenon of nature"?

I concede that the category of nonpatentable "[p]henomena of nature," like the categories of "mental processes" and "abstract intellectual concepts," is not easy to define. See *Flook*, *supra*, at 589 ("The line between a patentable 'process' and an unpatentable 'principle' is not always clear"); cf. *Nichols*, 45 F. 2d, at 122 ("[W]e are as aware as anyone that the line [between copyrighted material and noncopyrightable ideas], wherever it is drawn, will seem arbitrary"). After all, many a patentable invention rests upon its inventor's knowledge of natural phenomena; many "process" patents seek to make abstract intellectual concepts workably concrete; and all conscious human action involves a mental process. See generally 1 Chisum § 1.03, at 1–78 to 1–295. Nor can one easily use such abstract categories directly to distinguish instances of likely beneficial, from likely harmful, forms of protection. Cf. FTC, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy, ch. 3, p. 1 (Oct. 2003) (hereinafter FTC) (collecting evidence that "issues of fixed cost recovery, alternative appropriability mechanisms, and relationships between initial and follow-on innovation" vary by industry); Burk & Lemley,

Policy Levers in Patent Law, 89 Va. L. Rev. 1575, 1577–1589 (2003) ("Recent evidence has demonstrated that this complex relationship [between patents and innovation] is . . . industry-specific at each stage of the patent process").

But this case is not at the boundary. It does not require us to consider the precise scope of the "natural phenomenon" doctrine or any other difficult issue. In my view, claim 13 is invalid no matter how narrowly one reasonably interprets that doctrine.

There can be little doubt that the correlation between homocysteine and vitamin deficiency set forth in claim 13 is a "natural phenomenon." That is what the petitioner argues. It is what the Solicitor General has told us. Brief for United States as *Amicus Curiae* 19 (filed Dec. 23, 2005) ("The natural relationship between elevated total homocysteine and deficiencies in the B vitamins is an unpatentable 'principle in natural philosophy or physical science'" (quoting *Morse*, 15 How., at 116)). Indeed, it is close to what the respondents concede. Brief for Respondents 31 ("The correlation between total homocysteine and deficiencies in cobalamin and folate that the Inventors discovered could be considered, standing alone, a 'natural phenomenon' in the literal sense: It is an observable aspect of biochemistry in at least some human populations").

The respondents argue, however, that the correlation is nonetheless patentable because claim 13 packages it in the form of a "process" for detecting vitamin deficiency, with discrete testing and correlating steps. They point to this Court's statements that a "process is not unpatentable simply because it contains a law of nature," *Flook*, 437 U. S., at 590; see also *Gottschalk*, *supra*, at 67, and that "an *application* of a law of nature . . . to a known . . . process may well be deserving of patent protection," *Diehr*, *supra*, at 187. They add that claim 13 is a patentable "application of a law of nature" because, considered as a whole, it (1) "Entails A Physical Transformation Of Matter," namely, the alteration

of a blood sample during whatever test is used, Brief for Respondents 33 (citing *Cochrane* v. *Deener*, 94 U. S. 780, 788 (1877); *Gottschalk*, 409 U. S., at 70), and because it (2) "produces a 'useful, concrete, and tangible result,'" namely, detection of a vitamin deficiency, Brief for Respondents 36 (citing *State Street Bank & Trust Co.* v. *Signature Financial Group, Inc.*, 149 F. 3d 1368, 1373 (CA Fed. 1998)).

In my view, however, the cases to which the respondents refer do not support their claim. Neither *Cochrane* nor *Gottschalk* can help them because the process described in claim 13 is *not* a process for transforming blood or any other matter. Claim 13's process instructs the user to (1) obtain test results and (2) think about them. Why should it matter if the test results themselves were obtained through an unpatented procedure that involved the transformation of blood? Claim 13 is indifferent to that fact, for it tells the user to use any test at all. Indeed, to use virtually any natural phenomenon for virtually any useful purpose could well involve the use of empirical information obtained through an unpatented means that might have involved transforming matter. Neither *Cochrane* nor *Gottschalk* suggests that that fact renders the phenomenon patentable. See *Cochrane*, *supra*, at 785 (upholding process for improving quality of flour by removing impurities with blasts of air); *Gottschalk*, *supra*, at 71–73 (rejecting process for converting numerals to binary form through mathematical formula).

Neither does the Federal Circuit's decision in *State Street Bank* help the respondents. That case does say that a process is patentable if it produces a "'useful, concrete and tangible result.'" 149 F. 3d, at 1373. But this Court has never made such a statement and, if taken literally, the statement would cover instances where this Court has held the contrary. The Court, for example, has invalidated a claim to the use of electromagnetic current for transmitting messages over long distances even though it produces a result

that seems "useful, concrete, and tangible." *Morse*, *supra*, at 116. Similarly the Court has invalidated a patent setting forth a system for triggering alarm limits in connection with catalytic conversion despite a similar utility, concreteness, and tangibility. *Flook*, *supra*. And the Court has invalidated a patent setting forth a process that transforms, for computer-programming purposes, decimal figures into binary figures—even though the result would seem useful, concrete, and at least arguably (within the computer's wiring system) tangible. *Gottschalk*, *supra*.

Even were I to assume (purely for argument's sake) that claim 13 meets certain general definitions of process patentability, however, it still fails the one at issue here: the requirement that it not amount to a simple natural correlation, *i. e.*, a "natural phenomenon." See *Flook*, *supra*, at 588, n. 9 (even assuming patent for improved catalytic converter system meets broad statutory definition of patentable "process," it is invalid under natural phenomenon doctrine); *Diehr*, 450 U. S., at 184–185 (explaining that, even if patent meets all other requirements, it must meet the natural phenomena requirement as well).

At most, respondents have simply described the natural law at issue in the abstract patent language of a "process." But they cannot avoid the fact that the process is no more than an instruction to read some numbers in light of medical knowledge. Cf. *id.*, at 192 (warning against "allow[ing] a competent draftsman to evade the recognized limitations on the type of subject matter eligible for patent protection"). One might, of course, reduce the "process" to a series of steps, *e. g.*, Step 1: gather data; Step 2: read a number; Step 3: compare the number with the norm; Step 4: act accordingly. But one can reduce *any* process to a series of steps. The question is what those steps embody. And here, aside from the unpatented test, they embody only the correlation between homocysteine and vitamin deficiency that the re-

searchers uncovered. In my view, that correlation is an unpatentable "natural phenomenon," and I can find nothing in claim 13 that adds anything more of significance.

IV

If I am correct in my conclusion in Part III that the patent is invalid, then special public interest considerations reinforce my view that we should decide this case. To fail to do so threatens to leave the medical profession subject to the restrictions imposed by this individual patent and others of its kind. Those restrictions may inhibit doctors from using their best medical judgment; they may force doctors to spend unnecessary time and energy to enter into license agreements; they may divert resources from the medical task of health care to the legal task of searching patent files for similar simple correlations; they may raise the cost of health care while inhibiting its effective delivery. See Brief for American Clinical Laboratory Association as *Amicus Curiae* 8–13.

Even if Part III is wrong, however, it still would be valuable to decide this case. Our doing so would help diminish legal uncertainty in the area, affecting a "substantial number of patent claims." See Brief for United States as *Amicus Curiae* 12–14 (filed Aug. 26, 2005). It would permit those in the medical profession better to understand the nature of their legal obligations. It would help Congress determine whether legislation is needed. Cf. 35 U. S. C. § 287(c) (limiting liability of medical practitioners for performance of certain medical and surgical procedures).

In either event, a decision from this generalist Court could contribute to the important ongoing debate, among both specialists and generalists, as to whether the patent system, as currently administered and enforced, adequately reflects the "careful balance" that "the federal patent laws . . . embod[y]." *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U. S. 141, 146 (1989). See also *eBay Inc.* v. *MercExchange, L. L. C.*, 547 U. S. 388, 396–397 (2006) (KENNEDY, J.,

concurring); FTC, ch. 4, at 1–44; Pollack, The Multiple Unconstitutionality of Business Method Patents: Common Sense, Congressional Consideration, and Constitutional History, 28 Rutgers Computer & Tech. L. J. 61 (2002); Pitofsky, Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy, 16 Berkeley Tech. L. J. 535, 542–546 (2001).

For these reasons, I respectfully dissent.

Syllabus

UNITED STATES *v.* GONZALEZ-LOPEZ

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 05–352. Argued April 18, 2006—Decided June 26, 2006

Respondent hired attorney Low to represent him on a federal drug charge. The District Court denied Low's application for admission *pro hac vice* on the ground that he had violated a professional conduct rule and then, with one exception, prevented respondent from meeting or consulting with Low throughout the trial. The jury found respondent guilty. Reversing, the Eighth Circuit held that the District Court erred in interpreting the disciplinary rule, that the court's refusal to admit Low therefore violated respondent's Sixth Amendment right to paid counsel of his choosing, and that this violation was not subject to harmless-error review.

Held: A trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to reversal of his conviction. Pp. 144–152.

(a) In light of the Government's concession of erroneous deprivation, the trial court's error violated respondent's Sixth Amendment right to counsel of choice. The Court rejects the Government's contention that the violation is not "complete" unless the defendant can show that substitute counsel was ineffective within the meaning of *Strickland* v. *Washington*, 466 U. S. 668, 691–696—*i. e.*, that his performance was deficient and the defendant was prejudiced by it—or the defendant can demonstrate that substitute counsel's performance, while not deficient, was not as good as what his counsel of choice would have provided, creating a "reasonable probability that . . . the result . . . would have been different," *id.*, at 694. To support these propositions, the Government emphasizes that the right to counsel is accorded to ensure that the accused receive a fair trial, *Mickens* v. *Taylor*, 535 U. S. 162, 166, and asserts that a trial is not unfair unless a defendant has been prejudiced. The right to counsel of choice, however, commands not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best. Cf. *Crawford* v. *Washington*, 541 U. S. 36, 61. That right was violated here; no additional showing of prejudice is required to make the violation "complete." Pp. 144–148.

(b) The Sixth Amendment violation is not subject to harmless-error analysis. Erroneous deprivation of the right to counsel of choice, "with

consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *Sullivan* v. *Louisiana*, 508 U. S. 275, 282. It "def[ies] analysis by 'harmless error' standards" because it "affec[ts] the framework within which the trial proceeds" and is not "simply an error in the trial process itself." *Arizona* v. *Fulminante*, 499 U. S. 279, 309–310. Different attorneys will pursue different strategies with regard to myriad trial matters, and the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides to go to trial. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. This inquiry is not comparable to that required to show that a counsel's deficient performance prejudiced a defendant. Pp. 148–151.

(c) Nothing in the Court's opinion casts any doubt or places any qualification upon its previous holdings limiting the right to counsel of choice and recognizing trial courts' authority to establish criteria for admitting lawyers to argue before them. However broad a trial court's discretion may be, this Court accepts the Government's concession that the District Court erred. Pp. 151–152.

399 F. 3d 924, affirmed and remanded.

SCALIA, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and KENNEDY and THOMAS, JJ., joined, *post*, p. 152.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Fisher*, *Lisa S. Blatt*, and *Daniel S. Goodman*.

Jeffrey L. Fisher argued the cause for respondent. With him on the brief were *J. Richard McEachern*, *Pamela S. Karlan*, *Joseph H. Low IV*, *Thomas C. Goldstein*, *Amy Howe*, and *Kevin K. Russell*.*

**Quin Denvir*, *Joshua L. Dratel*, and *David M. Porter* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

JUSTICE SCALIA delivered the opinion of the Court.

We must decide whether a trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to a reversal of his conviction.

I

Respondent Cuauhtemoc Gonzalez-Lopez was charged in the Eastern District of Missouri with conspiracy to distribute more than 100 kilograms of marijuana. His family hired attorney John Fahle to represent him. After the arraignment, respondent called a California attorney, Joseph Low, to discuss whether Low would represent him, either in addition to or instead of Fahle. Low flew from California to meet with respondent, who hired him.

Some time later, Low and Fahle represented respondent at an evidentiary hearing before a Magistrate Judge. The Magistrate Judge accepted Low's provisional entry of appearance and permitted Low to participate in the hearing on the condition that he immediately file a motion for admission *pro hac vice*. During the hearing, however, the Magistrate Judge revoked the provisional acceptance on the ground that, by passing notes to Fahle, Low had violated a court rule restricting the cross-examination of a witness to one counsel.

The following week, respondent informed Fahle that he wanted Low to be his only attorney. Low then filed an application for admission *pro hac vice*. The District Court denied his application without comment. A month later, Low filed a second application, which the District Court again denied without explanation. Low's appeal, in the form of an application for a writ of mandamus, was dismissed by the United States Court of Appeals for the Eighth Circuit.

Fahle filed a motion to withdraw as counsel and for a show-cause hearing to consider sanctions against Low. Fahle asserted that, by contacting respondent while respondent was represented by Fahle, Low violated Mo. Rule

of Professional Conduct 4–4.2 (2003), which prohibits a lawyer "[i]n representing a client" from "communicat[ing] about the subject of the representation with a party . . . represented by another lawyer" without that lawyer's consent. Low filed a motion to strike Fahle's motion. The District Court granted Fahle's motion to withdraw and granted a continuance so that respondent could find new representation. Respondent retained a local attorney, Karl Dickhaus, for the trial. The District Court then denied Low's motion to strike and, for the first time, explained that it had denied Low's motions for admission *pro hac vice* primarily because, in a separate case before it, Low had violated Rule 4–4.2 by communicating with a represented party.

The case proceeded to trial, and Dickhaus represented respondent. Low again moved for admission and was again denied. The court also denied Dickhaus's request to have Low at counsel table with him and ordered Low to sit in the audience and to have no contact with Dickhaus during the proceedings. To enforce the court's order, a United States Marshal sat between Low and Dickhaus at trial. Respondent was unable to meet with Low throughout the trial, except for once on the last night. The jury found respondent guilty.

After trial, the District Court granted Fahle's motion for sanctions against Low. It read Rule 4–4.2 to forbid Low's contact with respondent without Fahle's permission. It also reiterated that it had denied Low's motions for admission on the ground that Low had violated the same Rule in a separate matter.

Respondent appealed, and the Eighth Circuit vacated the conviction. 399 F. 3d 924 (2005). The court first held that the District Court erred in interpreting Rule 4–4.2 to prohibit Low's conduct both in this case and in the separate matter on which the District Court based its denials of his admission motions. The District Court's denials of these motions were therefore erroneous and violated respondent's

Sixth Amendment right to paid counsel of his choosing. See *id.*, at 928–932. The court then concluded that this Sixth Amendment violation was not subject to harmless-error review. See *id.*, at 932–935. We granted certiorari. 546 U. S. 1085 (2006).

II

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." We have previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. See *Wheat* v. *United States*, 486 U. S. 153, 159 (1988). Cf. *Powell* v. *Alabama*, 287 U. S. 45, 53 (1932) ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice"). The Government here agrees, as it has previously, that "the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 624–625 (1989). To be sure, the right to counsel of choice "is circumscribed in several important respects." *Wheat*, *supra*, at 159. But the Government does not dispute the Eighth Circuit's conclusion in this case that the District Court erroneously deprived respondent of his counsel of choice.

The Government contends, however, that the Sixth Amendment violation is not "complete" unless the defendant can show that substitute counsel was ineffective within the meaning of *Strickland* v. *Washington*, 466 U. S. 668, 691–696 (1984)—*i. e.*, that substitute counsel's performance was deficient and the defendant was prejudiced by it. In the alternative, the Government contends that the defendant must at least demonstrate that his counsel of choice would have pursued a different strategy that would have created a "reason-

able probability that . . . the result of the proceedings would have been different," *id.*, at 694—in other words, that he was prejudiced within the meaning of *Strickland* by the denial of his counsel of choice even if substitute counsel's performance was not constitutionally deficient.[1] To support these propositions, the Government points to our prior cases, which note that the right to counsel "has been accorded . . . not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Mickens* v. *Taylor*, 535 U. S. 162, 166 (2002) (internal quotation marks omitted). A trial is not unfair and thus the Sixth Amendment is not violated, the Government reasons, unless a defendant has been prejudiced.

Stated as broadly as this, the Government's argument in effect reads the Sixth Amendment as a more detailed version of the Due Process Clause—and then proceeds to give no effect to the details. It is true enough that the purpose of the rights set forth in that Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair. What the Government urges upon us here is what was urged upon us (successfully, at one time, see *Ohio* v. *Roberts*, 448 U. S. 56 (1980)) with regard to the Sixth Amendment's right of confrontation—a line of reasoning that "abstracts from the right to its purposes, and then eliminates the right." *Maryland* v. *Craig*, 497 U. S. 836, 862 (1990) (SCALIA, J., dissenting).

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[1] The dissent proposes yet a third standard—viz., that the defendant must show "'an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represents the defendant at trial.'" *Post*, at 156 (opinion of ALITO, J.). That proposal suffers from the same infirmities (outlined later in text) that beset the Government's positions. In addition, however, it greatly impairs the clarity of the law. How is a lower-court judge to know what an "identifiable difference" consists of? Whereas the Government at least appeals to *Strickland* and the case law under it, the most the dissent can claim by way of precedential support for its rule is that it is "consistent with" cases that never discussed the issue of prejudice. *Post*, at 156.

Since, it was argued, the purpose of the Confrontation Clause was to ensure the reliability of evidence, so long as the testimonial hearsay bore "indicia of reliability," the Confrontation Clause was not violated. See *Roberts*, *supra*, at 65–66. We rejected that argument (and our prior cases that had accepted it) in *Crawford* v. *Washington*, 541 U. S. 36 (2004), saying that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.*, at 61.

So also with the Sixth Amendment right to counsel of choice. It commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." *Strickland*, *supra*, at 684–685. In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation "complete."[2]

The cases the Government relies on involve the right to the effective assistance of counsel, the violation of which generally requires a defendant to establish prejudice. See, *e. g.*,

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[2] The dissent resists giving effect to our cases' recognition, and the Government's concession, that a defendant has a right to be defended by counsel of his choosing. It argues that because the Sixth Amendment guarantees the right to the "assistance of counsel," it is not violated unless "the erroneous disqualification of a defendant's counsel of choice . . . impair[s] the assistance that a defendant receives at trial." *Post*, at 153. But if our cases (and the Government's concession) mean anything, it is that the Sixth Amendment is violated when the erroneous disqualification of counsel "impair[s] the assistance that a defendant receives at trial *[from the counsel that he chose]*."

Strickland, 466 U. S., at 694; *Mickens*, *supra*, at 166; *United States* v. *Cronic*, 466 U. S. 648 (1984). The earliest case generally cited for the proposition that "the right to counsel is the right to the effective assistance of counsel," *McMann* v. *Richardson*, 397 U. S. 759, 771, n. 14 (1970), was based on the Due Process Clause rather than on the Sixth Amendment, see *Powell*, 287 U. S., at 57 (cited in, *e. g.*, *McMann*, *supra*, at 771, n. 14). And even our recognition of the right to effective counsel within the Sixth Amendment was a consequence of our perception that representation by counsel "is critical to the ability of the adversarial system to produce just results." *Strickland*, *supra*, at 685. Having derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from that same purpose. See *Mickens*, *supra*, at 166. The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there—*effective* (not mistake-free) representation. Counsel cannot be "ineffective" unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not "complete" until the defendant is prejudiced. See *Strickland*, *supra*, at 685.

The right to select counsel of one's choice, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trial.[3] It has been regarded as the root

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[3] In *Wheat* v. *United States*, 486 U. S. 153 (1988), where we formulated the right to counsel of choice and discussed some of the limitations upon it, we took note of the overarching purpose of fair trial in holding that the trial court has discretion to disallow a first choice of counsel that would create serious risk of conflict of interest. *Id.*, at 159. It is one thing to conclude that the right to counsel of choice may be limited by the need for fair trial, but quite another to say that the right does not exist unless its denial renders the trial unfair.

meaning of the constitutional guarantee. See *Wheat*, 486 U. S., at 159; *Andersen* v. *Treat*, 172 U. S. 24 (1898). See generally W. Beaney, The Right to Counsel in American Courts 18–24, 27–33 (1955). Cf. *Powell*, *supra*, at 53. Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

III

Having concluded, in light of the Government's concession of erroneous deprivation, that the trial court violated respondent's Sixth Amendment right to counsel of choice, we must consider whether this error is subject to review for harmlessness. In *Arizona* v. *Fulminante*, 499 U. S. 279 (1991), we divided constitutional errors into two classes. The first we called "trial error," because the errors "occurred during presentation of the case to the jury" and their effect may "be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." *Id.*, at 307–308 (internal quotation marks omitted). These include "most constitutional errors." *Id.*, at 306. The second class of constitutional error we called "structural defects." These "defy analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds," and are not "simply an error in the trial process itself." *Id.*, at

309–310.[4] See also *Neder* v. *United States*, 527 U. S. 1, 7–9 (1999). Such errors include the denial of counsel, see *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), the denial of the right of self-representation, see *McKaskle* v. *Wiggins*, 465 U. S. 168, 177–178, n. 8 (1984), the denial of the right to public trial, see *Waller* v. *Georgia*, 467 U. S. 39, 49, n. 9 (1984), and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction, see *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993).

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[4] The dissent criticizes us for our trial error/structural defect dichotomy, asserting that *Fulminante* never said that "trial errors are the *only* sorts of errors amenable to harmless-error review, or that *all* errors affecting the framework within which the trial proceeds are structural," *post*, at 159 (internal quotation marks and citation omitted). Although it is hard to read that case as doing anything other than dividing constitutional error into two comprehensive categories, our ensuing analysis in fact relies neither upon such comprehensiveness nor upon trial error as the touchstone for the availability of harmless-error review. Rather, here, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error. See *Waller* v. *Georgia*, 467 U. S. 39, 49, n. 9 (1984) (violation of the public-trial guarantee is not subject to harmlessness review because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance"); *Vasquez* v. *Hillery*, 474 U. S. 254, 263 (1986) ("[W]hen a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained"). The dissent would use "fundamental unfairness" as the sole criterion of structural error, and cites a case in which that was the determining factor, see *Neder* v. *United States*, 527 U. S. 1, 9 (1999) (quoted by the dissent, *post*, at 158). But this has not been the only criterion we have used. In addition to the above cases using difficulty of assessment as the test, we have also relied on the irrelevance of harmlessness, see *McKaskle* v. *Wiggins*, 465 U. S. 168, 177, n. 8 (1984) ("Since the right to self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis"). Thus, it is the dissent that creates a single, inflexible criterion, inconsistent with the reasoning of our precedents, when it asserts that *only* those errors that *always* or *necessarily* render a trial fundamentally unfair and unreliable are structural, *post*, at 159.

We have little trouble concluding that erroneous deprivation of the right to counsel of choice, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *Id.*, at 282. Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds," *Fulminante, supra,* at 310—or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

The Government acknowledges that the deprivation of choice of counsel pervades the entire trial, but points out that counsel's ineffectiveness may also do so and yet we do not allow reversal of a conviction for that reason without a showing of prejudice. But the requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue; it is not a matter of showing that the violation was harmless, but of showing that a violation of the right to effective representation *occurred.* A choice-of-counsel violation occurs *whenever* the defendant's choice is wrongfully denied. Moreover, if and when counsel's ineffectiveness "pervades" a trial, it does so (to the extent we can detect it) through identifiable mistakes. We can assess how

those mistakes affected the outcome. To determine the effect of wrongful denial of choice of counsel, however, we would not be looking for mistakes committed by the actual counsel, but for differences in the defense that would have been made by the rejected counsel—in matters ranging from questions asked on *voir dire* and cross-examination to such intangibles as argument style and relationship with the prosecutors. We would have to speculate upon what matters the rejected counsel would have handled differently—or indeed, would have handled the same but with the benefit of a more jury-pleasing courtroom style or a longstanding relationship of trust with the prosecutors. And then we would have to speculate upon what effect those different choices or different intangibles might have had. The difficulties of conducting the two assessments of prejudice are not remotely comparable.[5]

IV

Nothing we have said today casts any doubt or places any qualification upon our previous holdings that limit the right to counsel of choice and recognize the authority of trial courts to establish criteria for admitting lawyers to argue before them. As the dissent too discusses, *post*, at 154, the right to counsel of choice does not extend to defendants who require counsel to be appointed for them. See *Wheat*, 486 U. S., at 159; *Caplin & Drysdale*, 491 U. S., at 624, 626. Nor

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[5] In its discussion of the analysis that would be required to conduct harmless-error review, the dissent focuses on which counsel was "better." See *post*, at 158–159. This focus has the effect of making the analysis look achievable, but it is fundamentally inconsistent with the principle (which the dissent purports to accept for the sake of argument) that the Sixth Amendment can be violated without a showing of harm to the quality of representation. Cf. *McKaskle*, *supra*, at 177, n. 8. By framing its inquiry in these terms and expressing indignation at the thought that a defendant may receive a new trial when his actual counsel was at least as effective as the one he wanted, the dissent betrays its misunderstanding of the nature of the right to counsel of choice and its confusion of this right with the right to effective assistance of counsel.

may a defendant insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation. See *Wheat*, 486 U. S., at 159–160. We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, *id.*, at 163–164, and against the demands of its calendar, *Morris* v. *Slappy*, 461 U. S. 1, 11–12 (1983). The court has, moreover, an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat*, *supra*, at 160. None of these limitations on the right to choose one's counsel is relevant here. This is not a case about a court's power to enforce rules or adhere to practices that determine which attorneys may appear before it, or to make scheduling and other decisions that effectively exclude a defendant's first choice of counsel. However broad a court's discretion may be, the Government has conceded that the District Court here erred when it denied respondent his choice of counsel. Accepting that premise, we hold that the error violated respondent's Sixth Amendment right to counsel of choice and that this violation is not subject to harmless-error analysis.

* * *

The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

I disagree with the Court's conclusion that a criminal conviction must automatically be reversed whenever a trial court errs in applying its rules regarding *pro hac vice* admissions and as a result prevents a defendant from being represented at trial by the defendant's first-choice attorney. In-

stead, a defendant should be required to make at least *some* showing that the trial court's erroneous ruling adversely affected the quality of assistance that the defendant received. In my view, the majority's contrary holding is based on an incorrect interpretation of the Sixth Amendment and a misapplication of harmless-error principles. I respectfully dissent.

I

The majority makes a subtle but important mistake at the outset in its characterization of what the Sixth Amendment guarantees. The majority states that the Sixth Amendment protects "the right of a defendant who does not require appointed counsel to choose who will represent him." *Ante*, at 144. What the Sixth Amendment actually protects, however, is the right to have *the assistance* that the defendant's counsel of choice is able to provide. It follows that if the erroneous disqualification of a defendant's counsel of choice does not impair the assistance that a defendant receives at trial, there is no violation of the Sixth Amendment.[1]

The language of the Sixth Amendment supports this interpretation. The Assistance of Counsel Clause focuses on what a defendant is entitled to receive ("Assistance"), rather than on the identity of the provider. The background of the adoption of the Sixth Amendment points in the same direction. The specific evil against which the Assistance of Counsel Clause was aimed was the English common-law rule severely limiting a felony defendant's ability to be assisted by counsel. *United States* v. *Ash*, 413 U. S. 300, 306 (1973). "[T]he core purpose of the counsel guarantee was to assure 'Assistance' at trial," *id.*, at 309, and thereby "to assure fairness in the adversary criminal process," *United States* v.

[1] This view is consistent with the Government's concession that "[t]he Sixth Amendment . . . encompasses a non-indigent defendant's right to select counsel who will represent him in a criminal prosecution," Brief for United States 11, though this right is "circumscribed in several important respects," *id.*, at 12 (internal quotation marks omitted).

Morrison, 449 U. S. 361, 364 (1981). It was not "the essential aim of the Amendment . . . to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat* v. *United States*, 486 U. S. 153, 159 (1988); cf. *Morris* v. *Slappy*, 461 U. S. 1, 14 (1983) ("[W]e reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel").

There is no doubt, of course, that the right "to have the Assistance of Counsel" carries with it a limited right to be represented by counsel of choice. At the time of the adoption of the Bill of Rights, when the availability of appointed counsel was generally limited,[2] that is how the right inevitably played out: A defendant's right to have the assistance of counsel necessarily meant the right to have the assistance of whatever counsel the defendant was able to secure. But from the beginning, the right to counsel of choice has been circumscribed.

For one thing, a defendant's choice of counsel has always been restricted by the rules governing admission to practice before the court in question. The Judiciary Act of 1789 made this clear, providing that parties "in all the courts of the United States" had the right to "the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein." Ch. 20, §35, 1 Stat. 92. Therefore, if a defendant's first-choice attorney was not eligible to appear under the rules of a particular court, the defendant had no right to be represented by that attorney. Indeed, if a defendant's top 10 or top 25 choices were all attorneys who were not eligible to appear in the court in question, the defendant had no right to be represented by any of them. Today, rules governing admission to practice before particular courts continue to limit the ability of a criminal defendant

[2] See Act of Apr. 30, 1790, ch. 9, §29, 1 Stat. 118 (providing for appointment of counsel in capital cases); *Betts* v. *Brady*, 316 U. S. 455, 467, n. 20 (1942) (surveying state statutes).

to be represented by counsel of choice. See *Wheat*, *supra*, at 159.

The right to counsel of choice is also limited by conflict-of-interest rules. Even if a defendant is aware that his or her attorney of choice has a conflict, and even if the defendant is eager to waive any objection, the defendant has no constitutional right to be represented by that attorney. See 486 U. S., at 159–160.

Similarly, the right to be represented by counsel of choice can be limited by mundane case-management considerations. If a trial judge schedules a trial to begin on a particular date and defendant's counsel of choice is already committed for other trials until some time thereafter, the trial judge has discretion under appropriate circumstances to refuse to postpone the trial date and thereby, in effect, to force the defendant to forgo counsel of choice. See, *e. g.*, *Slappy*, *supra*; *United States* v. *Hughey*, 147 F. 3d 423, 428–431 (CA5 1998).

These limitations on the right to counsel of choice are tolerable because the focus of the right is the quality of the representation that the defendant receives, not the identity of the attorney who provides the representation. Limiting a defendant to those attorneys who are willing, available, and eligible to represent the defendant still leaves a defendant with a pool of attorneys to choose from—and, in most jurisdictions today, a large and diverse pool. Thus, these restrictions generally have no adverse effect on a defendant's ability to secure the best assistance that the defendant's circumstances permit.

Because the Sixth Amendment focuses on the quality of the assistance that counsel of choice would have provided, I would hold that the erroneous disqualification of counsel does not violate the Sixth Amendment unless the ruling diminishes the quality of assistance that the defendant would have otherwise received. This would not require a defendant to show that the second-choice attorney was constitutionally ineffective within the meaning of *Strickland* v. *Washing-*

ton, 466 U. S. 668 (1984). Rather, the defendant would be entitled to a new trial if the defendant could show "an identifiable difference in the quality of representation between the disqualified counsel and the attorney who represents the defendant at trial." *Rodriguez* v. *Chandler*, 382 F. 3d 670, 675 (CA7 2004), cert. denied, 543 U. S. 1156 (2005).

This approach is fully consistent with our prior decisions. We have never held that the erroneous disqualification of counsel violates the Sixth Amendment when there is no prejudice, and while we have stated in several cases that the Sixth Amendment protects a defendant's right to counsel of choice, see *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 624–625 (1989); *Wheat*, *supra*, at 159; *Powell* v. *Alabama*, 287 U. S. 45, 53 (1932), we had no occasion in those cases to consider whether a violation of this right can be shown where there is no prejudice. Nor do our opinions in those cases refer to that question. It is therefore unreasonable to read our general statements regarding counsel of choice as addressing the issue of prejudice.[3]

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[3] *Powell* is the case generally cited as first noting a defendant's right to counsel of choice. *Powell* involved an infamous trial in which the defendants were prevented from obtaining any counsel of their choice and were instead constrained to proceed with court-appointed counsel of dubious effectiveness. We held that this denied them due process and that "a fair opportunity to secure counsel of [one's] own choice" is a necessary concomitant of the right to counsel. 287 U. S., at 53; cf. *id.*, at 71 ("[T]he failure of the trial court to give [petitioners] reasonable time and opportunity to secure counsel was a clear denial of due process"). It is clear from the facts of the case that we were referring to the denial of the opportunity to choose *any* counsel, and we certainly said nothing to suggest that a violation of the right to counsel of choice could be established without any showing of prejudice.

In *Wheat*, we held that the trial judge had not erred in declining the defendant's waiver of his right to conflict-free counsel, and therefore we had no need to consider whether an incorrect ruling would have required reversal of the defendant's conviction in the absence of a showing of prejudice. We noted that "the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment," 486 U. S., at

II

But even accepting, as the majority holds, that the erroneous disqualification of counsel of choice always violates the Sixth Amendment, it still would not follow that reversal is required in all cases. The Constitution, by its terms, does not mandate any particular remedy for violations of its own provisions. Instead, we are bound in this case by Federal Rule of Criminal Procedure 52(a), which instructs federal courts to "disregar[d]" "[a]ny error . . . which does not affect substantial rights." See also 28 U. S. C. § 2111; *Chapman* v. *California*, 386 U. S. 18, 22 (1967). The only exceptions we have recognized to this rule have been for "a limited class of fundamental constitutional errors that 'defy analysis by "harmless error" standards.'" *Neder* v. *United States*, 527 U. S. 1, 7 (1999) (quoting *Arizona* v. *Fulminante*, 499 U. S. 279, 309 (1991)); see also *Chapman*, *supra*, at 23. "Such errors . . . 'necessarily render a trial fundamentally unfair' [and] deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle

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159, but we went on to stress that this right "is circumscribed in several important respects," *ibid.*, including by the requirement of bar membership and rules against conflicts of interest. *Wheat* did not suggest that a violation of the limited Sixth Amendment right to counsel of choice can be established without showing prejudice, and our statements about the Sixth Amendment's "purpose" and "essential aim"—providing effective advocacy and a fair trial, *ibid.*—suggest the opposite.

Finally, in *Caplin & Drysdale*, we held that the challenged action of the trial judge—entering an order forfeiting funds that the defendant had earmarked for use in paying his attorneys—had been proper, and, accordingly, we had no occasion to address the issue of prejudice. We recognized that "the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds," 491 U. S., at 624–625, but we added that "[w]hatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his own money to obtain the advice and assistance of . . . counsel,'" *id.*, at 626 (omission in original).

for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *Neder*, *supra*, at 8–9 (quoting *Rose* v. *Clark*, 478 U. S. 570, 577–578 (1986); second omission in original); see also *ante*, at 149 (listing such errors).

Thus, in *Neder*, we rejected the argument that the omission of an element of a crime in a jury instruction "*necessarily* render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." 527 U. S., at 9. In fact, in that case, "quite the opposite [was] true: Neder was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel; a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to Neder's defense . . . ." *Ibid.*

Neder's situation—with an impartial judge, the correct standard of proof, assistance of counsel, and a fair jury—is much like respondent's. Fundamental unfairness does not inexorably follow from the denial of first-choice counsel. The "decision to retain a particular lawyer" is "often uninformed," *Cuyler* v. *Sullivan*, 446 U. S. 335, 344 (1980); a defendant's second-choice lawyer may thus turn out to be better than the defendant's first-choice lawyer. More often, a defendant's first- and second-choice lawyers may be simply indistinguishable. These possibilities would not justify violating the right to choice of counsel, but they do make me hard put to characterize the violation as "*always* render[ing] a trial unfair," *Neder*, *supra*, at 9. Fairness may not limit the right, see *ante*, at 145, but it does inform the remedy.

Nor is it always or nearly always impossible to determine whether the first choice would have provided better representation than the second choice. There are undoubtedly cases in which the prosecution would have little difficulty showing that the second-choice attorney was better qualified than or at least as qualified as the defendant's initial choice,

and there are other cases in which it will be evident to the trial judge that any difference in ability or strategy could not have possibly affected the outcome of the trial.

Requiring a defendant to fall back on a second-choice attorney is not comparable to denying a defendant the right to be represented by counsel at all. Refusing to permit a defendant to receive the assistance of any counsel is the epitome of fundamental unfairness, and as far as the effect on the outcome is concerned, it is much more difficult to assess the effect of a complete denial of counsel than it is to assess the effect of merely preventing representation by the defendant's first-choice attorney. To be sure, when the effect of an erroneous disqualification is hard to gauge, the prosecution will be unable to meet its burden of showing that the error was harmless beyond a reasonable doubt. But that does not justify eliminating the possibility of showing harmless error in all cases.

The majority's focus on the "trial error"/"structural defect" dichotomy is misleading. In *Fulminante*, we used these terms to denote two poles of constitutional error that had appeared in prior cases; trial errors always lead to harmless-error review, while structural defects always lead to automatic reversal. See 499 U. S., at 306–310. We did not suggest that trial errors are the *only* sorts of errors amenable to harmless-error review, or that *all* errors "affecting the framework within which the trial proceeds," *id.*, at 310, are structural. The touchstone of structural error is fundamental unfairness and unreliability. Automatic reversal is strong medicine that should be reserved for constitutional errors that *"always"* or *"necessarily,"* *Neder*, *supra*, at 9 (emphasis in original), produce such unfairness.

III

Either of the two courses outlined above—requiring at least some showing of prejudice, or engaging in harmless-

error review—would avoid the anomalous and unjustifiable consequences that follow from the majority's two-part rule of error without prejudice followed by automatic reversal.

Under the majority's holding, a defendant who is erroneously required to go to trial with a second-choice attorney is automatically entitled to a new trial even if this attorney performed brilliantly. By contrast, a defendant whose attorney was ineffective in the constitutional sense (*i. e.*, "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," *Strickland*, 466 U. S., at 687) cannot obtain relief without showing prejudice.

Under the majority's holding, a trial court may adopt rules severely restricting *pro hac vice* admissions, cf. *Leis* v. *Flynt*, 439 U. S. 438, 443 (1979) *(per curiam)*, but if it adopts a generous rule and then errs in interpreting or applying it, the error automatically requires reversal of any conviction, regardless of whether the erroneous ruling had any effect on the defendant.

Under the majority's holding, some defendants will be awarded new trials even though it is clear that the erroneous disqualification of their first-choice counsel did not prejudice them in the least. Suppose, for example, that a defendant is initially represented by an attorney who previously represented the defendant in civil matters and who has little criminal experience. Suppose that this attorney is erroneously disqualified and that the defendant is then able to secure the services of a nationally acclaimed and highly experienced criminal defense attorney who secures a surprisingly favorable result at trial—for instance, acquittal on most but not all counts. Under the majority's holding, the trial court's erroneous ruling automatically means that the Sixth Amendment was violated—even if the defendant makes no attempt to argue that the disqualified attorney would have done a better job. In fact, the defendant would still be entitled to

a new trial on the counts of conviction even if the defendant publicly proclaimed after the verdict that the second attorney had provided better representation than any other attorney in the country could have possibly done.

Cases as stark as the above hypothetical are unlikely, but there are certainly cases in which the erroneous disqualification of a defendant's first-choice counsel neither seriously upsets the defendant's preferences nor impairs the defendant's representation at trial. As noted above, a defendant's second-choice lawyer may sometimes be better than the defendant's first-choice lawyer. Defendants who retain counsel are frequently forced to choose among attorneys whom they do not know and about whom they have limited information, and thus a defendant may not have a strong preference for any one of the candidates. In addition, if all of the attorneys considered charge roughly comparable fees, they may also be roughly comparable in experience and ability. Under these circumstances, the erroneous disqualification of a defendant's first-choice attorney may simply mean that the defendant will be represented by an attorney whom the defendant very nearly chose initially and who is able to provide representation that is just as good as that which would have been furnished by the disqualified attorney. In light of these realities, mandating reversal without even a minimal showing of prejudice on the part of the defendant is unwarranted.

The consequences of the majority's holding are particularly severe in the federal system and in other court systems that do not allow a defendant to take an interlocutory appeal when counsel is disqualified. See *Flanagan* v. *United States*, 465 U. S. 259, 260 (1984). Under such systems, appellate review typically occurs after the defendant has been tried and convicted. At that point, if an appellate court concludes that the trial judge made a marginally incorrect ruling in applying its own *pro hac vice* rules, the appellate court

has no alternative but to order a new trial—even if there is not even any claim of prejudice. The Sixth Amendment does not require such results.

Because I believe that some showing of prejudice is required to establish a violation of the Sixth Amendment, I would vacate and remand to let the Court of Appeals determine whether there was prejudice. However, assuming for the sake of argument that no prejudice is required, I believe that such a violation, like most constitutional violations, is amenable to harmless-error review. Our statutes demand it, and our precedents do not bar it. I would then vacate and remand to let the Court of Appeals determine whether the error was harmless in this case.

Syllabus

KANSAS *v.* MARSH

CERTIORARI TO THE SUPREME COURT OF KANSAS

No. 04–1170. Argued December 7, 2005—Reargued April 25, 2006—Decided June 26, 2006

Finding three aggravating circumstances that were not outweighed by mitigating circumstances, a Kansas jury convicted respondent Marsh of, *inter alia*, capital murder and sentenced him to death. Marsh claimed on direct appeal that Kan. Stat. Ann. §21–4624(e) establishes an unconstitutional presumption in favor of death by directing imposition of the death penalty when aggravating and mitigating circumstances are in equipoise. Agreeing, the Kansas Supreme Court concluded that §21–4624(e)'s weighing equation violated the Eighth and Fourteenth Amendments and remanded for a new trial.

Held:

1. This Court has jurisdiction to review the Kansas Supreme Court's judgment under 28 U. S. C. §1257. That provision authorizes review of a State's final judgment when a state statute's validity is questioned on federal constitutional grounds, and it permits review even when the state-court proceedings are not complete where the federal claim has been finally decided and later review of the federal issue cannot be had, whatever the case's outcome, *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 481. Although Marsh will be retried, the State Supreme Court's determination that the death penalty statute is unconstitutional is final and binding on the lower state courts. Thus, the State will be unable to obtain further review of its law in this case. This Court has deemed lower court decisions final for §1257 purposes in like circumstances, see, *e. g.*, *Florida* v. *Meyers*, 466 U. S. 380 *(per curiam)*. Pp. 168–169.

2. The State Supreme Court's judgment is not supported by adequate and independent state grounds. Marsh maintains that the judgment was based on state law, the State Supreme Court having previously reviewed the statute in *State* v. *Kleypas*. However, *Kleypas* itself rested on federal law. In this case, the State Supreme Court chastised the *Kleypas* court for avoiding the constitutional issue, squarely found §21–4624(e) unconstitutional on its face, and overruled *Kleypas* in relevant part. P. 169.

3. Kansas' capital sentencing statute is constitutional. Pp. 169–181.

(a) *Walton* v. *Arizona*, 497 U. S. 639, requires approval of the Kansas statute. There, the Court held that a state death penalty statute may give the defendant the burden to prove that mitigating circum-

stances outweigh aggravating circumstances. *A fortiori*, Kansas' death penalty statute, consistent with the Constitution, may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the two are in equipoise. Pp. 169–173.

(b) Even if, as Marsh contends, *Walton* does not directly control here, general principles in this Court's death penalty jurisprudence lead to the same conclusion. So long as a state system satisfies the requirements of *Furman* v. *Georgia*, 408 U. S. 238, and *Gregg* v. *Georgia*, 428 U. S. 153—that a system must rationally narrow the class of death-eligible defendants and must permit a jury to render a reasonable, individualized sentencing determination—a State has a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are weighed. The use of mitigation evidence is a product of the individual-sentencing requirement. Defendants have the right to present sentencers with information relevant to the sentencing decision, and sentencers are obliged to consider that information in determining the appropriate sentence. The thrust of this Court's mitigation jurisprudence ends here, for the Court has never held that the Constitution requires a specific method for balancing aggravating and mitigating factors. Pp. 173–175.

(c) Kansas' death penalty statute satisfies the constitutional mandates of *Furman* and its progeny because it rationally narrows the class of death-eligible defendants and permits a jury to consider any mitigating evidence relevant to its sentencing determination. The State's weighing equation merely channels a jury's discretion by providing criteria by which the jury may determine whether life or death is appropriate. Its system provides the kind of guided discretion sanctioned in, *e. g.*, *Walton*, *supra*. Contrary to Marsh's argument, § 21–4624(e) does not create a general presumption in favor of the death penalty. A life sentence must be imposed if the State fails to demonstrate the existence of an aggravating circumstance beyond a reasonable doubt, if the State cannot prove beyond a reasonable doubt that aggravating circumstances are not outweighed by mitigating circumstances, or if the jury is unable to reach a unanimous decision in any respect. Marsh's contentions that an equipoise determination reflects juror confusion or inability to decide between life and death or that the jury may use equipoise as a loophole to shirk its constitutional duty to render a reasoned, moral sentencing decision rest on an implausible characterization of the Kansas statute—that a jury's determination that aggravators and mitigators are in equipoise is not a *decision*, much less a decision *for death*. Weighing is not an end, but a means to reaching a decision. Kansas' instructions clearly

inform the jury that a determination that the evidence is in equipoise is a decision for death. Pp. 175–180.

278 Kan. 520, 102 P. 3d 445, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 182. STEVENS, J., filed a dissenting opinion, *post*, p. 199. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 203.

Phill Kline, Attorney General of Kansas, argued and reargued the cause for petitioner. With him on the briefs were *Nola Tedesco Foulston*, *Jared S. Maag*, Deputy Attorney General, *Kristafer Ailslieger*, Assistant Attorney General, *Theodore B. Olson*, *Mark A. Perry*, *Matthew D. McGill*, *Chad A. Readler*, and *Mary Beth Young*.

Rebecca E. Woodman argued and reargued the cause and filed a brief for respondent.*

JUSTICE THOMAS delivered the opinion of the Court.

Kansas law provides that if a unanimous jury finds that aggravating circumstances are not outweighed by mitigating circumstances, the death penalty shall be imposed. Kan. Stat. Ann. § 21–4624(e) (1995). We must decide whether this statute, which requires the imposition of the death penalty

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**Kent S. Scheidegger* and *Charles L. Hobson* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

Sean D. O'Brien, *David Gottlieb*, and *Nathan B. Webb*, all *pro se*, filed a brief for Kansas Law Professors as *amici curiae* urging affirmance.

A brief of *amici curiae* was filed for the State of Arizona et al. by *Terry Goddard*, Attorney General of Arizona, *Mary O'Grady*, Solicitor General, *Kent Cattani*, and *Gene C. Schaerr*, by *William E. Thro*, State Solicitor General of Virginia, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *John W. Suthers* of Colorado, *Thurbert E. Baker* of Georgia, *Lawrence G. Wasden* of Idaho, *Charles C. Foti, Jr.*, of Louisiana, *Jim Hood* of Mississippi, *Mike McGrath* of Montana, *Brian Sandoval* of Nevada, *Henry McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Paul G. Summers* of Tennessee, *Greg Abbott* of Texas, and *Rob McKenna* of Washington.

when the sentencing jury determines that aggravating evidence and mitigating evidence are in equipoise, violates the Constitution. We hold that it does not.

I

Respondent Michael Lee Marsh II broke into the home of Marry Ane Pusch and lay in wait for her to return. When Marry Ane entered her home with her 19-month-old daughter, M. P., Marsh repeatedly shot Marry Ane, stabbed her, and slashed her throat. The home was set on fire with the toddler inside, and M. P. burned to death.

The jury convicted Marsh of the capital murder of M. P., the first-degree premeditated murder of Marry Ane, aggravated arson, and aggravated burglary. The jury found beyond a reasonable doubt the existence of three aggravating circumstances, and that those circumstances were not outweighed by any mitigating circumstances. On the basis of those findings, the jury sentenced Marsh to death for the capital murder of M. P. The jury also sentenced Marsh to life imprisonment without possibility of parole for 40 years for the first-degree murder of Marry Ane, and consecutive sentences of 51 months' imprisonment for aggravated arson and 34 months' imprisonment for aggravated burglary.

On direct appeal, Marsh challenged § 21–4624(e), which reads:

> "If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K. S. A. 21–4625 . . . exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law."

Focusing on the phrase "shall be sentenced to death," Marsh argued that § 21–4624(e) establishes an unconstitutional pre-

sumption in favor of death because it directs imposition of the death penalty when aggravating and mitigating circumstances are in equipoise.

The Kansas Supreme Court agreed, and held that the Kansas death penalty statute, § 21–4624(e), is facially unconstitutional. 278 Kan. 520, 534–535, 102 P. 3d 445, 458 (2004). The court concluded that the statute's weighing equation violated the Eighth and Fourteenth Amendments of the United States Constitution because, "[i]n the event of equipoise, *i. e.*, the jury's determination that the balance of any aggravating circumstances and any mitigating circumstances weighed equal, the death penalty would be required." *Id.*, at 534, 102 P. 3d, at 457. The Kansas Supreme Court affirmed Marsh's conviction and sentence for aggravated burglary and premeditated murder of Marry Ane, and reversed and remanded for new trial Marsh's convictions for capital murder of M. P. and aggravated arson.[1] We granted certiorari, 544 U. S. 1060 (2005), and now reverse the Kansas Supreme Court's judgment that Kansas' capital sentencing statute, Kan. Stat. Ann. § 21–4624(e), is facially unconstitutional.

II

In addition to granting certiorari to review the constitutionality of Kansas' capital sentencing statute, we also directed the parties to brief and argue: (1) whether we have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U. S. C. § 1257, as construed by *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975); and (2) whether the Kansas Supreme Court's judgment is supported by adequate state grounds independent of federal law. 544 U. S. 1060. Having considered the parties' arguments, we con-

[1] The Kansas Supreme Court found that the trial court committed reversible error by excluding circumstantial evidence of third-party guilt connecting Eric Pusch, Marry Ane's husband, to the crimes, and accordingly ordered a new trial on this ground. 278 Kan., at 528–533, 102 P. 3d, at 454–457.

clude that we have jurisdiction in this case and that the constitutional issue is properly before the Court.

A

Title 28 U. S. C. § 1257 authorizes this Court to review, by writ of certiorari, the final judgment of the highest court of a State when the validity of a state statute is questioned on federal constitutional grounds. This Court has determined that the foregoing authorization permits review of the judgment of the highest court of a State, even though the state-court proceedings are not yet complete, "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting, supra,* at 481.

Here, although Marsh will be retried on the capital murder and aggravated arson charges, the Kansas Supreme Court's determination that Kansas' death penalty statute is facially unconstitutional is final and binding on the lower state courts. Thus, the State will be unable to obtain further review of its death penalty law later in this case. If Marsh is acquitted of capital murder, double jeopardy and state law will preclude the State from appealing. If he is reconvicted, the State will be prohibited under the Kansas Supreme Court's decision from seeking the death penalty, and there would be no opportunity for the State to seek further review of that prohibition. Although Marsh argues that a provision of the Kansas criminal appeals statute, Kan. Stat. Ann. § 22–3602(b) (2003 Cum. Supp.), would permit the State to appeal the invalidation of Kansas' death penalty statute, that contention is meritless. That statute provides for limited appeal in only four enumerated circumstances, none of which apply here. We have deemed lower court decisions final for 28 U. S. C. § 1257 purposes in like circumstances, see *Florida* v. *Meyers,* 466 U. S. 380 (1984) *(per curiam); South Dakota*

v. *Neville*, 459 U. S. 553 (1983); *New York* v. *Quarles*, 467 U. S. 649 (1984), and do so again here.

B

Nor is the Kansas Supreme Court's decision supported by adequate and independent state grounds. Marsh maintains that the Kansas Supreme Court's decision was based on the severability of § 21–4624(e) under state law, and not the constitutionality of that provision under federal law, the latter issue having been resolved by the Kansas Supreme Court in *State* v. *Kleypas*, 272 Kan. 894, 40 P. 3d 139 (2001) *(per curiam)*. Marsh's argument fails.

Kleypas, itself, rested on federal law. See *id.*, at 899–903, 40 P. 3d, at 166–167. In rendering its determination here, the Kansas Supreme Court observed that *Kleypas*, "held that the weighing equation in K. S. A. 21–4624(e) as written was unconstitutional under the Eighth and Fourteenth Amendments" as applied to cases in which aggravating evidence and mitigating evidence are equally balanced. 278 Kan., at 534, 102 P. 3d, at 457. In this case, the Kansas Supreme Court chastised the *Kleypas* court for avoiding the constitutional issue of the statute's facial validity, squarely held that § 21–4624(e) is unconstitutional on its face, and overruled the portion of *Kleypas* upholding the statute through the constitutional avoidance doctrine and judicial revision. 278 Kan., at 534–535, 539–542, 102 P. 3d, at 458, 462. As in *Kleypas*, the Kansas Supreme Court clearly rested its decision here on the Eighth and Fourteenth Amendments to the United States Constitution. We, therefore, have jurisdiction to review its decision. See *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983).

III

This case is controlled by *Walton* v. *Arizona*, 497 U. S. 639 (1990), overruled on other grounds, *Ring* v. *Arizona*, 536 U. S. 584 (2002). In that case, a jury had convicted Walton

of a capital offense. At sentencing, the trial judge found the existence of two aggravating circumstances and that the mitigating circumstances did not call for leniency, and sentenced Walton to death. 497 U. S., at 645. The Arizona Supreme Court affirmed, and this Court granted certiorari to resolve the conflict between the Arizona Supreme Court's decision in *State* v. *Walton*, 159 Ariz. 571, 769 P. 2d 1017 (1989) (en banc) (holding the Arizona death penalty statute constitutional), and the Ninth Circuit's decision in *Adamson* v. *Ricketts*, 865 F. 2d 1011, 1043–1044 (1988) (en banc) (finding the Arizona death penalty statute unconstitutional because, "in situations where the mitigating and aggravating circumstances are in balance, or, where the mitigating circumstances give the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court from imposing a sentence less than death"). See *Walton*, *supra*, at 647.

Consistent with the Ninth Circuit's conclusion in *Adamson*, Walton argued to this Court that the Arizona capital sentencing system created an unconstitutional presumption in favor of death because it "tells an Arizona sentencing judge who finds even a single aggravating factor, that death must be imposed, unless—as the Arizona Supreme Court put it in Petitioner's case—there are 'outweighing mitigating factors.'" Brief for Petitioner in *Walton* v. *Arizona*, O. T. 1989, No. 88–7351, p. 33; see also *id.*, at 34 (arguing that the statute is unconstitutional because the defendant "'must . . . bear the risk of nonpersuasion that any mitigating circumstance will not outweigh the aggravating circumstance'" (alteration omitted)). Rejecting Walton's argument, see 497 U. S., at 650, 651, this Court stated:

> "So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on

him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Id.*, at 650.

This Court noted that, as a requirement of individualized sentencing, a jury must have the opportunity to consider all evidence relevant to mitigation, and that a state statute that permits a jury to consider any mitigating evidence comports with that requirement. *Id.*, at 652 (citing *Blystone* v. *Pennsylvania*, 494 U. S. 299, 307 (1990)). The Court also pointedly observed that while the Constitution requires that a sentencing jury have discretion, it does not mandate that discretion be unfettered; the States are free to determine the manner in which a jury may consider mitigating evidence. 497 U. S., at 652 (citing *Boyde* v. *California*, 494 U. S. 370, 374 (1990)). So long as the sentencer is not precluded from considering relevant mitigating evidence, a capital sentencing statute cannot be said to impermissibly, much less automatically, impose death. 497 U. S., at 652 (citing *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) (plurality opinion), and *Roberts* v. *Louisiana*, 428 U. S. 325 (1976) (plurality opinion)). Indeed, *Walton* suggested that the only capital sentencing systems that would be impermissibly mandatory were those that would "automatically impose death upon conviction for certain types of murder." 497 U. S., at 652.

Contrary to Marsh's contentions and the Kansas Supreme Court's conclusions, see 278 Kan., at 536–538, 102 P. 3d, at 459, the question presented in the instant case was squarely before this Court in *Walton*. Though, as Marsh notes, the *Walton* Court did not employ the term "equipoise," that issue undeniably gave rise to the question this Court sought to resolve, and it was necessarily included in Walton's argument that the Arizona system was unconstitutional because it required the death penalty unless the mitigating circumstances *outweighed* the aggravating circumstances. See *supra*, at 170. Moreover, the dissent in *Walton* reinforces what is evident from the opinion and the judgment of the Court—that the equipoise issue was before the Court, and

that the Court resolved the issue in favor of the State. Indeed, the "equipoise" issue was, in large measure, the basis of the *Walton* dissent. See 497 U. S., at 687–688 (opinion of Blackmun, J.) ("If the mitigating and aggravating circumstances are in equipoise, the [Arizona] statute requires that the trial judge impose capital punishment. The assertion that a sentence of death may be imposed in such a case runs directly counter to the Eighth Amendment requirement that a capital sentence must rest upon a 'determination that death is the appropriate punishment in a specific case'"). Thus, although *Walton* did not discuss the equipoise issue explicitly, that issue was resolved by its holding. Cf. *post*, at 199–200 (STEVENS, J., dissenting); cf. also *post*, at 203–204, n. 1 (SOUTER, J., dissenting).

Our conclusion that *Walton* controls here is reinforced by the fact that the Arizona and Kansas statutes are comparable in important respects. Similar to the express language of the Kansas statute, the Arizona statute at issue in *Walton* has been consistently construed to mean that the death penalty will be imposed upon a finding that aggravating circumstances are not outweighed by mitigating circumstances.[2] See *State* v. *Ysea*, 191 Ariz. 372, 375, 956 P. 2d 499, 502 (1998) (en banc); *State* v. *Gretzler*, 135 Ariz. 42, 55, 659 P. 2d 1, 14 (1983) (in banc); *Adamson*, *supra*, at 1041–1043. Like the Kansas statute, the Arizona statute places the burden of proving the existence of aggravating circumstances on the State, and both statutes require the defendant to proffer mitigating evidence.

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[2] Arizona Rev. Stat. Ann. § 13–703(E) (West Supp. 2005) provides:

"In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

The statutes are distinct in one respect. The Arizona statute, once the State has met its burden, tasks the defendant with the burden of proving sufficient mitigating circumstances to overcome the aggravating circumstances and that a sentence less than death is therefore warranted. In contrast, the Kansas statute requires the State to bear the burden of proving to the jury, beyond a reasonable doubt, that aggravators are not outweighed by mitigators and that a sentence of death is therefore appropriate; it places no additional evidentiary burden on the capital defendant. This distinction operates in favor of Kansas capital defendants. Otherwise the statutes function in substantially the same manner and are sufficiently analogous for our purposes. Thus, *Walton* is not distinguishable from the instant case.

Accordingly, the reasoning of *Walton* requires approval of the Kansas death penalty statute. At bottom, in *Walton*, the Court held that a state death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances. *A fortiori*, Kansas' death penalty statute, consistent with the Constitution, may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise.

IV

A

Even if, as Marsh contends, *Walton* does not directly control, the general principles set forth in our death penalty jurisprudence would lead us to conclude that the Kansas capital sentencing system is constitutionally permissible. Together, our decisions in *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*, and *Gregg* v. *Georgia*, 428 U. S. 153 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), establish that a state capital sentencing system must:

(1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime. See *id.*, at 189. So long as a state system satisfies these requirements, our precedents establish that a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed. See *Franklin* v. *Lynaugh*, 487 U. S. 164, 179 (1988) (plurality opinion) (citing *Zant* v. *Stephens*, 462 U. S. 862, 875–876, n. 13 (1983)).

The use of mitigation evidence is a product of the requirement of individualized sentencing. See *Graham* v. *Collins*, 506 U. S. 461, 484–489 (1993) (THOMAS, J., concurring) (discussing the development of mitigation precedent). In *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978), a plurality of this Court held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis in original.) The Court has held that the sentencer must have full access to this "'highly relevant'" information. *Id.*, at 603 (quoting *Williams* v. *New York*, 337 U. S. 241, 247 (1949); alteration omitted). Thus, in *Lockett*, the Court struck down the Ohio death penalty statute as unconstitutional because, by limiting a jury's consideration of mitigation to three factors specified in the statute, it prevented sentencers in capital cases from giving independent weight to mitigating evidence militating in favor of a sentence other than death. 438 U. S., at 604–605. Following *Lockett*, in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), a majority of the Court held that a sentencer may not categorically refuse to consider any relevant mitigating evidence. *Id.*, at 114; see also *Skipper* v. *South Carolina*, 476 U. S. 1, 3–4 (1986) (discussing *Eddings*).

In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here. "[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." *Franklin*, *supra*, at 179 (citing *Zant*, *supra*, at 875–876, n. 13). Rather, this Court has held that the States enjoy "'a constitutionally permissible range of discretion in imposing the death penalty.'" *Blystone*, 494 U. S., at 308 (quoting *McCleskey* v. *Kemp*, 481 U. S. 279, 305–306 (1987)). See also 494 U. S., at 307 (stating that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence"); *Graham*, *supra*, at 490 (THOMAS, J., concurring) (stating that "[o]ur early mitigating cases may thus be read as doing little more than safeguarding the adversary process in sentencing proceedings by conferring on the defendant an affirmative right to place his relevant evidence before the sentencer").

B

The Kansas death penalty statute satisfies the constitutional mandates of *Furman* and its progeny because it rationally narrows the class of death-eligible defendants and permits a jury to consider any mitigating evidence relevant to its sentencing determination. It does not interfere, in a constitutionally significant way, with a jury's ability to give independent weight to evidence offered in mitigation.

Kansas' procedure narrows the universe of death-eligible defendants consistent with Eighth Amendment requirements. Under Kansas law, imposition of the death penalty is an *option* only after a defendant is convicted of capital murder, which requires that one or more specific elements beyond intentional premeditated murder be found. See

Kan. Stat. Ann. §21–3439. Once convicted of capital murder, a defendant becomes *eligible* for the death penalty only if the State seeks a separate sentencing hearing, §§21–4706(c) (2003 Cum. Supp.), 21–4624(a); App. 23 (Instruction No. 2), and proves beyond a reasonable doubt the existence of one or more statutorily enumerated aggravating circumstances. Kan. Stat. Ann. §§21–4624(c), (e), and 21–4625; App. 24 (Instruction No. 3).

Consonant with the individualized sentencing requirement, a Kansas jury is permitted to consider *any* evidence relating to *any* mitigating circumstance in determining the appropriate sentence for a capital defendant, so long as that evidence is relevant. §21–4624(c). Specifically, jurors are instructed:

> "A mitigating circumstance is that which in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, although it does not justify or excuse the offense. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case.
>
> "The appropriateness of the exercise of mercy can itself be a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted." *Id.*, at 24 (Instruction No. 4).[3]

Jurors are then apprised of, but not limited to, the factors that the defendant contends are mitigating. *Id.*, at 25–26. They are then instructed that "[e]ach juror must consider every mitigating factor that he or she individually finds to exist." *Id.*, at 26.

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[3]The "mercy" jury instruction alone forecloses the possibility of *Furman*-type error as it "eliminate[s] the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty." *Post*, at 206 (SOUTER, J., dissenting).

Kansas' weighing equation, *ibid.* (Instruction No. 5), merely channels a jury's discretion by providing it with criteria by which it may determine whether a sentence of life or death is appropriate. The system in Kansas provides the type of "'guided discretion,'" *Walton*, 497 U. S., at 659 (citing *Gregg*, 428 U. S., at 189), we have sanctioned in *Walton*, *Boyde*, and *Blystone*.

Indeed, in *Boyde*, this Court sanctioned a weighing jury instruction that is analytically indistinguishable from the Kansas jury instruction under review today. The *Boyde* jury instruction read:

> "'If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall impose* a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you *shall impose* a sentence of confinement in the state prison for life without the possibility of parole.'" 494 U. S., at 374 (emphasis in original).

Boyde argued that the mandatory language of the instruction prevented the jury from rendering an individualized sentencing determination. This Court rejected that argument, concluding that it was foreclosed by *Blystone*, where the Court rejected a nearly identical challenge to the Pennsylvania death penalty statute. 494 U. S., at 307.[4] In so holding, this Court noted that the mandatory language of the statute did not prevent the jury from *considering* all relevant mitigating evidence. *Boyde*, *supra*, at 374. Similarly here, § 21–4624(e) does not prevent a Kansas jury from considering mitigating evidence. Marsh's argument that the

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[4] In *Blystone*, the Pennsylvania statute authorized imposition of a death sentence if the jury concluded "that the aggravating circumstances outweigh[ed] the mitigating circumstances present in the particular crime committed by the particular defendant, or that there [were] no such mitigating circumstances." 494 U. S., at 305.

Kansas provision is impermissibly mandatory is likewise foreclosed.[5]

Contrary to Marsh's argument, § 21–4624(e) does not create a general presumption in favor of the death penalty in the State of Kansas. Rather, the Kansas capital sentencing system is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction. If the State fails to meet its burden to demonstrate the existence of an aggravating circumstance(s) beyond a reasonable doubt, a sentence of life imprisonment must be imposed. *Ibid.*; App. 27 (Instruction No. 10). If the State overcomes this hurdle, then it bears the additional burden of proving beyond a reasonable doubt that aggravating circumstances are not outweighed by mitigating circumstances. *Ibid.* (Instruction No. 10); *id.*, at 26 (Instruction No. 5). Significantly, although the defendant appropriately bears the burden of proffering mitigating circumstances—a burden of production—he never bears the burden of demonstrating that mitigating circumstances outweigh aggravating circumstances. Instead, the State always has the burden of demonstrating that mitigating evidence does not outweigh

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[5] Contrary to JUSTICE SOUTER's assertion, the Court's decisions in *Boyde* and *Blystone* did not turn on the "predominance of the aggravators" in those cases. *Post*, at 205 (dissenting opinion). Rather, those decisions plainly turned on the fact that the mandatory language of the respective statutes did not prevent the sentencing jury from "consider[ing] and giv[ing] effect to all relevant mitigating evidence." *Blystone*, *supra*, at 305. See also *Boyde*, 494 U. S., at 377 ("[T]he legal principle we expounded in *Blystone* clearly requires rejection of Boyde's claim as well, because the mandatory language of [California jury instruction] 8.84.2 is not alleged to have interfered with the consideration of mitigating evidence"). The language of the Kansas statute at issue here no more "dictate[s] death," *post*, at 205, than the mandatory language at issue in *Boyde* and *Blystone*. See *Blystone*, *supra*, at 305 (explaining that the Pennsylvania statute is not "'mandatory' as that term was understood in *Woodson* [v. *North Carolina*, 428 U. S. 280 (1976),] or *Roberts* [v. *Louisiana*, 428 U. S. 325 (1976),]" because "[d]eath is not automatically imposed upon conviction for certain types of murder").

aggravating evidence. Absent the State's ability to meet that burden, the default is life imprisonment. Moreover, if the jury is unable to reach a unanimous decision—in any respect—a sentence of life must be imposed. § 21–4624(c); App. 28 (Instruction No. 12). This system does not create a presumption that death is the appropriate sentence for capital murder.[6]

Nor is there any force behind Marsh's contention that an equipoise determination reflects juror confusion or inability to decide between life and death, or that a jury may use equipoise as a loophole to shirk its constitutional duty to render a reasoned, moral decision, see *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'Connor, J., concurring), regarding whether death is an appropriate sentence for a particular defendant. Such an argument rests on an implausible characterization of the Kansas statute—that a jury's determination that aggravators and mitigators are in equipoise is not a *decision*, much less a decision *for death*—and thus misses the mark. Cf. *post*, at 206–207 (SOUTER, J., dissenting) (arguing that Kansas' weighing equation undermines individualized sentencing). Weighing is not an end; it is merely a means to reaching a decision. The decision the jury must reach is whether life or death is the appropriate punishment. The Kansas jury instructions clearly inform the jury that a determination that the evidence is in equipoise is a decision for—not a presumption in favor of—death. Kansas jurors, presumed to follow their instructions, are made aware that: a determination that mitigators outweigh aggravators is a

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[6] Additionally, Marsh's argument turns on reading § 21–4624(e) in isolation. Such a reading, however, is contrary to "'the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" *Boyde* v. *California*, 494 U. S. 370, 378 (1990) (citing *Boyd* v. *United States*, 271 U. S. 104, 107 (1926)). The constitutionality of a State's death penalty system turns on review of that system in context. We thus reject his disengaged interpretation of § 21–4624(e).

decision that a life sentence is appropriate; a determination that aggravators outweigh mitigators *or* a determination that mitigators do not outweigh aggravators—including a finding that aggravators and mitigators are in balance—is a decision that death is the appropriate sentence; and an inability to reach a unanimous decision will result in a sentence of life imprisonment. So informed, far from the abdication of duty or the inability to select an appropriate sentence depicted by Marsh and JUSTICE SOUTER, a jury's conclusion that aggravating evidence and mitigating evidence are in equipoise is a *decision for death* and is indicative of the type of measured, normative process in which a jury is constitutionally tasked to engage when deciding the appropriate sentence for a capital defendant.

V

JUSTICE SOUTER (hereinafter dissent) argues that the advent of DNA testing has resulted in the "exoneratio[n]" of "innocent" persons "in numbers never imagined before the development of DNA tests." *Post*, at 208. Based upon this "new empirical argument about how 'death is different,'" *post*, at 210, the dissent concludes that Kansas' sentencing system permits the imposition of the death penalty in the absence of reasoned moral judgment.

But the availability of DNA testing, and the questions it might raise about the accuracy of guilt-phase determinations in capital cases, is simply irrelevant to the question before the Court today, namely, the constitutionality of Kansas' capital *sentencing* system. Accordingly, the accuracy of the dissent's factual claim that DNA testing has established the "innocence" of numerous convicted persons under death sentences—and the incendiary debate it invokes—is beyond the scope of this opinion.[7]

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[7] But see The Penalty of Death, in Debating the Death Penalty: Should America Have Capital Punishment? The Experts on Both Sides Make Their Best Case 117, 127–132, 134 (H. Bedau & P. Cassell eds. 2004). See

The dissent's general criticisms against the death penalty are ultimately a call for resolving all legal disputes in capital cases by adopting the outcome that makes the death penalty more difficult to impose. While such a bright-line rule may be easily applied, it has no basis in law. Indeed, the logical consequence of the dissent's argument is that the death penalty can only be just in a system that does not permit error. Because the criminal justice system does not operate perfectly, abolition of the death penalty is the only answer to the moral dilemma the dissent poses. This Court, however, does not sit as a moral authority. Our precedents do not prohibit the States from authorizing the death penalty, even in our imperfect system. And those precedents do not empower this Court to chip away at the States' prerogatives to do so on the grounds the dissent invokes today.

* * *

We hold that the Kansas capital sentencing system, which directs imposition of the death penalty when a jury finds that aggravating and mitigating circumstances are in equipoise, is constitutional. Accordingly, we reverse the judgment of the Kansas Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

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also Markman & Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L. Rev. 121, 126–145 (1988) (examining accuracy in use of the term "innocent" in death penalty studies and literature); Marquis, The Myth of Innocence, 95 J. Crim. L. & C. 501, 508 (2005) ("Words like 'innocence' convey enormous moral authority and are intended to drive the public debate by appealing to a deep and universal revulsion at the idea that someone who is genuinely blameless could wrongly suffer for a crime in which he had no involvement"); *People* v. *Smith*, 185 Ill. 2d 532, 545, 708 N. E. 2d 365, 371 (1999) ("While a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. . . . Rather, [a reversal of conviction] indicates simply that the prosecution has failed to meet its burden of proof").

JUSTICE SCALIA, concurring.

I join the opinion of the Court. I write separately to clarify briefly the import of my joinder, and to respond at somewhat greater length first to JUSTICE STEVENS' contention that this case, and cases like it, do not merit our attention, and second to JUSTICE SOUTER's claims about risks inherent in capital punishment.

I

Part III of the Court's opinion—which makes plain why *Walton* v. *Arizona*, 497 U. S. 639 (1990), controls this case—would be sufficient to reverse the judgment below. I nonetheless join Part IV as well, which describes why Kansas's death-penalty statute easily satisfies even a capital jurisprudence as incoherent as ours has become. In doing so, I do not endorse that incoherence, but adhere to my previous statement that "I will not . . . vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted." *Id.*, at 673 (concurring in part and concurring in judgment).

II

JUSTICE STEVENS' dissent gives several reasons why this case, and any criminal case in which the State is the petitioner, does not deserve our attention. "'[N]o rule of law,'" he says, "'commanded the Court to grant certiorari.'" *Post*, at 201 (quoting *California* v. *Ramos*, 463 U. S. 992, 1031 (1983) (STEVENS, J., dissenting)). But that is true, of course, of almost our entire docket; it is in the very nature of certiorari jurisdiction. Also self-evident, since the jurisdiction of the Kansas Supreme Court ends at the borders of that State, is the fact that "'[n]o other State would have been required to follow the [Kansas] precedent if it had been permitted to stand.'" *Post*, at 201 (STEVENS, J., dissenting) (quoting *Ramos*, *supra*, at 1031 (STEVENS, J., dissenting)). But if this signaled the impropriety of granting certiorari, we would never review state-court determinations of federal

law, even though they patently contradict (as the determination below does) the holdings of other state courts and Federal Courts of Appeals, compare 278 Kan. 520, 534–537, 102 P. 3d 445, 457–459 (2004) (case below), and *State* v. *Kleypas*, 272 Kan. 894, 1005–1007, 40 P. 3d 139, 225–226 (2001) *(per curiam)*, with, *e. g.*, *State* v. *Hoffman*, 123 Idaho 638, 646–647, 851 P. 2d 934, 942–943 (1993), and *Jones* v. *Dugger*, 928 F. 2d 1020, 1029 (CA11 1991)—and indeed, even when they patently contradict our own decisions. Our principal responsibility under current practice, however, and a primary basis for the Constitution's allowing us to be accorded jurisdiction to review state-court decisions, see Art. III, § 2, cls. 1 and 2, is to ensure the integrity and uniformity of federal law.[1] See this Court's Rule 10(b), (c). Fulfillment of this responsibility is, to put it mildly, an adequate answer to the

[1] The dissent observes that Congress did not initially grant us the full jurisdiction that the Constitution authorizes, but only allowed us to review cases *rejecting* the assertion of governing federal law. See *post*, at 202, n. (opinion of STEVENS, J.). That is unsurprising and immaterial. The original Constitution contained few guarantees of individual rights against the States, and in clashes of governmental authority there was small risk that the state courts would erroneously side with the new Federal Government. (In 1789, when the first Judiciary Act was passed, the Bill of Rights had not yet been adopted, and once it was, it did not apply against the States, see *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243 (1833).) Congress would have been most unlikely to contemplate that state courts would erroneously invalidate state actions on federal grounds. The early history of our jurisdiction assuredly does not support the dissent's awarding of special preference to the constitutional rights of criminal defendants. Even with respect to *federal* defendants (who *did* enjoy the protections of the Bill of Rights), "during the first 100 years of the Court's existence there was no provision made by Congress for Supreme Court review of federal criminal convictions, an omission that Congress did not remedy until 1889 and beyond." R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 66 (8th ed. 2002). In any case, *present* law is plain. The 1988 statute cited by the dissent and forming the basis of our current certiorari jurisdiction places States and defendants in precisely the same position. They are both entitled to petition for our review.

charge that "'[n]othing more than an interest in facilitating the imposition of the death penalty in [Kansas] justified this Court's exercise of its discretion to review the judgment of the [Kansas] Supreme Court.'" *Post*, at 201 (STEVENS, J., dissenting) (quoting *Ramos*, *supra*, at 1031 (STEVENS, J., dissenting)).

The dissent's assertion that our holding in *Ramos* was "ironi[c]," *post*, at 201 (opinion of STEVENS, J.), rests on a misguided view of federalism and, worse still, of a republican form of government. Only that can explain the dissent's suggestion that *Ramos*'s reversal of a state-court determination somehow undermined state authority. The California Supreme Court had ruled that a jury instruction inserted into the state penal code by voter initiative, see 463 U. S., at 995, n. 4, was invalid *as a matter of federal constitutional law*. See *id.*, at 996, 997, n. 7. When state courts erroneously invalidate actions taken by the people of a State (through initiative or through normal operation of the political branches of their state government) on *state-law* grounds, it is generally none of our business; and our displacing of those judgments would indeed be an intrusion upon state autonomy. But when state courts erroneously invalidate such actions because they believe federal law requires it—and *especially* when they do so because they believe the Federal *Constitution* requires it—review by this Court, far from *undermining* state autonomy, is the only possible way to *vindicate* it. When a federal constitutional interdict against the duly expressed will of the people of a State is erroneously pronounced by a State's highest court, no authority in the State—not even a referendum agreed to by all its citizens—can undo the error. Thus, a general presumption against such review displays not respect for the States, but a complacent willingness to allow judges to strip the people of the power to govern themselves. When we correct a state court's federal errors, *we return power to the State, and to its people.*

That is why our decision in *Ramos* was necessary. Our solemn responsibility is not merely to determine whether a State Supreme Court "ha[s] adequately protected [a defendant's] rights under the Federal Constitution," *post*, at 200 (STEVENS, J., dissenting). It is to ensure that when courts speak in the name of the Federal Constitution, they disregard none of its guarantees—neither those that ensure the rights of criminal defendants, nor those that ensure what Justice Black, in his famous dissent in *In re Winship*, 397 U. S. 358, 385 (1970), called "the most fundamental individual liberty of our people—the right of each man to participate in the self-government of his society." Turning a blind eye to federal constitutional error that benefits criminal defendants, allowing it to permeate in varying fashion each State Supreme Court's jurisprudence, would change the uniform "law of the land" into a crazy quilt. And on top of it all, of course, what the dissent proposes avowedly favors one party to the case: When a criminal defendant loses a questionable constitutional point, we may grant review; when the State loses, we must deny it. While it might be appropriate for Congress to place such a thumb upon the scales of our power to review, it seems to me a peculiar mode of decisionmaking for judges sworn to "impartially discharge . . . all the duties" of their office, 28 U. S. C. § 453.

Our decision to grant certiorari is guided by the considerations set forth in Rule 10. None of them turns on the identity of the party that the asserted misapplication of federal law has harmed. When state legislation is thwarted—not on the basis of state law, but on the basis of a questionable application of the Federal Constitution or laws—I shall continue to vote to grant the resulting petition for certiorari.

III

Finally, I must say a few words (indeed, more than a few) in response to Part III of JUSTICE SOUTER's dissent. This contains the disclaimer that the dissenters are not *(yet)*

ready to "generaliz[e] about the soundness of capital sentencing across the country," *post*, at 210; but that is in fact precisely what they do. The dissent essentially argues that capital punishment is such an undesirable institution—it results in the condemnation of such a large number of innocents—that any legal rule which eliminates its pronouncement, including the one favored by the dissenters in the present case, should be embraced. See *post*, at 210–211.

As a general rule, I do not think it appropriate for judges to heap either praise or censure upon a legislative measure that comes before them, lest it be thought that their validation, invalidation, or interpretation of it is driven by their desire to expand or constrict what they personally approve or disapprove as a matter of policy. In the present case, for example, people might leap to the conclusion that the dissenters' views on whether Kansas's equipoise rule is constitutional are determined by their personal disapproval of an institution that has been democratically adopted by 38 States and the United States. But of course that requires no leap; just a willingness to take the dissenters at their word. For as I have described, the dissenters' very argument is that imposition of the death penalty should be minimized by invalidation of the equipoise rule because it is a bad, "risk[y]," and "hazard[ous]" idea, *ibid.* A broader conclusion that people should derive, however (and I would not consider this much of a leap either), is that the dissenters' encumbering of the death penalty in *other* cases, with unwarranted restrictions neither contained in the text of the Constitution nor reflected in two centuries of practice under it, will be the product of their policy views—views not shared by the vast majority of the American people. The dissenters' proclamation of their policy agenda in the present case is especially striking because it is nailed to the door of the wrong church—that is, set forth in a case litigating a rule that has nothing to do with the evaluation of guilt or innocence. There are, of course, many cases in which the rule at issue

does serve that function, see, *e. g.*, *House* v. *Bell*, 547 U. S. 518 (2006). (Marsh himself has earned a remand by application of one such rule, see *ante*, at 167.) But as the Court observes, see *ante*, at 180, guilt or innocence is logically disconnected to the challenge in *this* case to *sentencing* standards. The *only* time the equipoise provision is relevant is when the State has proved a defendant guilty of a capital crime.[2]

There exists in some parts of the world sanctimonious criticism of America's death penalty, as somehow unworthy of a civilized society. (I say sanctimonious, because most of the countries to which these finger-waggers belong had the death penalty themselves until recently—and indeed, many of them would still have it if the democratic will prevailed.[3])

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[2] Not only are the dissent's views on the erroneous imposition of the death penalty irrelevant to the present case, but the dissent's proposed holding on the equipoise issue will not necessarily work to defendants' advantage. The equipoise provision of the Kansas statute imposes the death penalty only when the State proves *beyond a reasonable doubt* that mitigating factors do not outweigh the aggravators. See *ante*, at 166. If we were to disallow Kansas's scheme, the State could, as Marsh freely admits, replace it with a scheme requiring the State to prove *by a mere preponderance of the evidence* that the aggravators outweigh the mitigators. See Tr. of Oral Rearg. 36. I doubt that any defense counsel would accept this trade. The "preponderance" rule, while it sounds better, would almost surely produce more death sentences than an "equipoise beyond a reasonable doubt" requirement.

[3] It is commonly recognized that "[m]any European countries . . . abolished the death penalty in spite of public opinion rather than because of it." Bibas, Transparency and Participation in Criminal Procedure, 81 N. Y. U. L. Rev. 911, 931–932 (2006). See also *id.*, at 932, n. 88. Abolishing the death penalty has been made a condition of joining the Council of Europe, which is in turn a condition of obtaining the economic benefits of joining the European Union. See Waters, Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law, 93 Geo. L. J. 487, 525 (2005); Demleitner, Is There a Future for Leniency in the U. S. Criminal Justice System? 103 Mich. L. Rev. 1231, 1256, and n. 88 (2005). The European Union advocates against the death penalty even *in America;* there is a separate death-

It is a certainty that the opinion of a near-majority of the United States Supreme Court to the effect that our system condemns many innocent defendants to death will be trumpeted abroad as vindication of these criticisms. For that reason, I take the trouble to point out that the dissenting opinion has nothing substantial to support it.

It should be noted at the outset that the dissent does not discuss a single case—not one—in which it is clear that a person was executed for a crime he did not commit. If such an event had occurred in recent years, we would not have to hunt for it; the innocent's name would be shouted from the rooftops by the abolition lobby. The dissent makes much of the new-found capacity of DNA testing to establish innocence. But in every case of an executed defendant of which I am aware, that technology has *confirmed* guilt.

This happened, for instance, only a few months ago in the case of Roger Coleman. Coleman was convicted of the gruesome rape and murder of his sister-in-law, but he persuaded many that he was actually innocent and became the poster child for the abolitionist lobby. See Glod & Shear, DNA Tests Confirm Guilt of Man Executed by Va., Washington Post, Jan. 13, 2006, p. A1; Dao, DNA Ties Man Executed in '92 to the Murder He Denied, N. Y. Times, Jan. 13, 2006, p. A14. Around the time of his eventual execution, "his picture was on the cover of Time magazine ('This Man Might Be Innocent. This Man Is Due to Die'). He was interviewed from death row on 'Larry King Live,' the 'Today' show, 'Primetime Live,' 'Good Morning America' and 'The

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penalty page on the Web site of the Delegation of the European Commission to the U. S. A. See http://www.eurunion.org/legislat/deathpenalty/deathpenhome.htm (all Internet materials as visited June 17, 2006, and available in Clerk of Court's case file). The views of the European Union have been relied upon by Justices of this Court (including all four dissenters today) in narrowing the power of the American people to impose capital punishment. See, *e. g.*, *Atkins* v. *Virginia*, 536 U. S. 304, 317, n. 21 (2002) (citing, for the views of "the world community," the Brief for the European Union as *Amicus Curiae*).

Phil Donahue Show.'" Frankel, Burden of Proof, Washington Post, May 14, 2006, pp. W8, W11. Even one Justice of this Court, in an opinion filed shortly before the execution, cautioned that "Coleman has now produced substantial evidence that he may be innocent of the crime for which he was sentenced to die." *Coleman* v. *Thompson*, 504 U. S. 188, 189 (1992) (Blackmun, J., dissenting). Coleman ultimately failed a lie-detector test offered by the Governor of Virginia as a condition of a possible stay; he was executed on May 20, 1992. Frankel, *supra*, at W23; Glod & Shear, Warner Orders DNA Testing in Case of Man Executed in '92, Washington Post, Jan. 6, 2006, pp. A1, A6.

In the years since then, Coleman's case became a rallying point for abolitionists, who hoped it would offer what they consider the "Holy Grail: proof from a test tube that an innocent person had been executed." Frankel, *supra*, at W24. But earlier this year, a DNA test ordered by a later Governor of Virginia proved that Coleman was guilty, see, *e. g.*, Glod & Shear, DNA Tests Confirm Guilt of Man Executed by Va., *supra*, at A1; Dao, *supra*, at A14, even though his defense team had "proved" his innocence and had even identified "'the real killer'" (with whom they eventually settled a defamation suit). See Frankel, *supra*, at W23. And Coleman's case is not unique. See J. Marquis, Truth and Consequences: The Penalty of Death, in Debating the Death Penalty: Should America Have Capital Punishment? The Experts on Both Sides Make Their Best Case 117, 128–129 (H. Bedau & P. Cassell eds. 2004) (discussing the cases of supposed innocents Rick McGinn and Derek Barnabei, whose guilt was also confirmed by DNA tests).

Instead of identifying and discussing any particular case or cases of mistaken execution, the dissent simply cites a handful of studies that bemoan the alleged prevalence of wrongful death sentences. One study (by Lanier and Acker) is quoted by the dissent as claiming that "'more than 110' death row prisoners have been released since 1973 upon

findings that they were innocent of the crimes charged, and 'hundreds of additional wrongful convictions in potentially capital cases have been documented over the past century.'" *Post*, at 209–210 (opinion of SOUTER, J.). For the first point, Lanier and Acker cite the work of the Death Penalty Information Center (more about that below) and an article in a law review jointly authored by Radelet, Lofquist, and Bedau (two professors of sociology and a professor of philosophy). For the second point, they cite only a 1987 article by Bedau and Radelet. See Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21. In the very same paragraph which the dissent quotes, Lanier and Acker also refer to that 1987 article as "hav[ing] identified 23 individuals who, in their judgment, were convicted and executed in this country during the 20th century notwithstanding their innocence." Lanier & Acker, Capital Punishment, the Moratorium Movement, and Empirical Questions, 10 Psychology, Public Policy & Law 577, 593 (2004). This 1987 article has been highly influential in the abolitionist world. Hundreds of academic articles, including those relied on by today's dissent, have cited it. It also makes its appearance in judicial decisions—cited recently in a six-judge dissent in *House* v. *Bell*, 386 F. 3d 668, 708 (CA6 2004) (en banc) (Merritt, J., dissenting), for the proposition that "the system is allowing some innocent defendants to be executed." The article therefore warrants some further observations.

The 1987 article's obsolescence began at the moment of publication. The most recent executions it considered were in 1984, 1964, and 1951; the rest predate the Allied victory in World War II. (Two of the supposed innocents are Sacco and Vanzetti.) Bedau & Radelet, *supra*, at 73. Even if the innocence claims made in this study were true, all except (perhaps) the 1984 example would cast no light upon the functioning of our current system of capital adjudication. The legal community's general attitude toward criminal de-

fendants, the legal protections States afford, the constitutional guarantees this Court enforces, and the scope of federal habeas review are all vastly different from what they were in 1961. So are the scientific means of establishing guilt, and hence innocence—which are now so striking in their operation and effect that they are the subject of more than one popular TV series. (One of these new means, of course, is DNA testing—which the dissent seems to think is primarily a way to identify defendants erroneously convicted, rather than a highly effective way to avoid conviction of the innocent.)

But their current relevance aside, this study's conclusions are unverified. And if the support for its most significant conclusion—the execution of 23 innocents in the 20th century—is any indication of its accuracy, neither it, nor any study so careless as to rely upon it, is worthy of credence. The only execution of an innocent man it alleges to have occurred after the restoration of the death penalty in 1976—the Florida execution of James Adams in 1984—is the easiest case to verify. As evidence of Adams' innocence, it describes a hair that could not have been his as being "clutched in the victim's hand," Bedau & Radelet, *supra*, at 91. The hair was *not* in the victim's hand; "[i]t was a remnant of a sweeping of the ambulance and so could have come from another source." Markman & Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L. Rev. 121, 131 (1988). The study also claims that a witness who "heard a voice inside the victim's home at the time of the crime" testified that the "voice was a woman's," Bedau & Radelet, *supra*, at 91. The witness's actual testimony was that the voice, which said "'"In the name of God, don't do it"'" (and was hence unlikely to have been the voice of anyone but the male victim), "'sounded "kind of like a woman's voice, kind of like strangling or something . . . ."'" Markman & Cassell, 41 Stan. L. Rev., at 130. Bedau and Radelet

failed to mention that upon arrest on the afternoon of the murder Adams was found with some $200 in his pocket—one bill of which "was stained with type O blood. When Adams was asked about the blood on the money, he said that it came from a cut on his finger. His blood was type AB, however, while the victim's was type O." *Id.*, at 132. Among the other unmentioned, incriminating details: that the victim's *eyeglasses* were found in Adams' car, along with jewelry belonging to the victim, and clothing of Adams' stained with type O blood. *Ibid.* This is just a sample of the evidence arrayed against this "innocent." See *id.*, at 128–133, 148–150.

Critics have questioned the study's findings with regard to all its other cases of execution of alleged innocents for which "appellate opinions . . . set forth the facts proved at trial in detail sufficient to permit a neutral observer to assess the validity of the authors' conclusions." *Id.*, at 134. (For the rest, there was not "a reasonably complete account of the facts . . . readily available," *id.*, at 145.) As to those cases, the only readily verifiable ones, the authors of the 1987 study later acknowledged, "We agree with our critics that we have not 'proved' these executed defendants to be innocent; we never claimed that we had." Bedau & Radelet, The Myth of Infallibility: A Reply to Markman and Cassell, 41 Stan. L. Rev. 161, 164 (1988). One would have hoped that this disclaimer of the study's most striking conclusion, if not the study's dubious methodology, would have prevented it from being cited as authority in the pages of the United States Reports. But alas, it is too late for that. Although today's dissent relies on the study only indirectly, the two dissenters who were on the Court in January 1993 have already embraced it. "One impressive study," they noted (referring to the 1987 study), "has concluded that 23 innocent people have been executed in the United States in this century, including one as recently as 1984." *Herrera* v. *Collins*, 506 U. S. 390,

430, n. 1 (1993) (Blackmun, J., joined by STEVENS and SOUTER, JJ., dissenting).[4]

Remarkably avoiding any claim of erroneous executions, the dissent focuses on the large numbers of *non*-executed "exonerees" paraded by various professors. It speaks as though exoneration came about through the operation of some outside force to correct the mistakes of our legal system, rather than *as a consequence of the functioning of our legal system.* Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death sentence is carried out.

Of course even in identifying exonerees, the dissent is willing to accept anybody's say-so. It engages in no critical review, but merely parrots articles or reports that support its attack on the American criminal justice system. The dissent places significant weight, for instance, on the Illinois Report (compiled by the appointees of an Illinois Governor who had declared a moratorium upon the death penalty and who eventually commuted all death sentences in the State, see Warden, Illinois Death Penalty Reform: How It Happened, What It Promises, 95 J. Crim. L. & C. 381, 406–407, 410 (2005)), which it claims shows that "false verdicts" are "remarkable in number." *Post,* at 210 (opinion of SOUTER, J.). The dissent claims that this report identifies 13 inmates released from death row after they were determined to be innocent. To take one of these cases, discussed by the dissent as an example of a judgment "as close to innocence as

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[4] See also *Callins* v. *Collins,* 510 U. S. 1141, 1158, n. 8 (1994) (Blackmun, J., dissenting from denial of certiorari) ("Innocent persons *have* been executed, see Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21, 36, 173–179 (1987), perhaps recently, see *Herrera* v. *Collins,* 506 U. S. 390 (1993), and will continue to be executed under our death penalty scheme").

any judgments courts normally render," *post*, at 209, n. 2: In *People* v. *Smith*, 185 Ill. 2d 532, 708 N. E. 2d 365 (1999), the defendant was twice convicted of murder. After his first trial, the Supreme Court of Illinois "reversed [his] conviction based upon certain evidentiary errors" and remanded his case for a new trial. *Id.*, at 534, 708 N. E. 2d, at 366. The second jury convicted Smith again. The Supreme Court of Illinois again reversed the conviction because it found that the evidence was insufficient to establish guilt beyond a reasonable doubt. *Id.*, at 542–543, 708 N. E. 2d, at 370–371. The court explained:

> "While a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. Courts do not find people guilty or innocent. . . . A not guilty verdict expresses no view as to a defendant's innocence. Rather, [a reversal of conviction] indicates simply that the prosecution has failed to meet its burden of proof." *Id.*, at 545, 708 N. E. 2d, at 371.

This case alone suffices to refute the dissent's claim that the Illinois Report distinguishes between "exoneration of a convict because of actual innocence, and reversal of a judgment because of legal error affecting conviction or sentence but not inconsistent with guilt in fact," *post*, at 208, n. 2. The broader point, however, is that it is utterly impossible to regard "exoneration"—however casually defined—as a failure of the capital justice system, rather than as a vindication of its effectiveness in releasing not only defendants who are innocent, but those whose guilt has not been established beyond a reasonable doubt.

Another of the dissent's leading authorities on exoneration of the innocent is Gross, Jacoby, Matheson, Montgomery, & Patil, Exonerations in the United States 1989 Through 2003, 95 J. Crim. L. & C. 523 (2005) (hereinafter Gross). The dissent quotes that study's self-congratulatory "criteria" of ex-

oneration—seemingly so rigorous that no one could doubt the study's reliability. See *post*, at 209–210, n. 3 (opinion of SOUTER, J.). But in fact that article, like the others cited, is notable not for its rigorous investigation and analysis, but for the fervor of its belief that the American justice system is condemning the innocent "in numbers," as the dissent puts it, "never imagined before the development of DNA tests." *Post*, at 208 (opinion of SOUTER, J.). Among the article's list of 74 "exonerees," Gross 529, is Jay Smith of Pennsylvania. Smith—a school principal—earned three death sentences for slaying one of his teachers and her two young children. See *Smith* v. *Holtz*, 210 F. 3d 186, 188 (CA3 2000). His retrial for triple murder was barred on double-jeopardy grounds because of prosecutorial misconduct during the first trial. *Id.*, at 194. But Smith could not leave well enough alone. He had the gall to sue, under 42 U. S. C. § 1983, for false imprisonment. The Court of Appeals for the Third Circuit affirmed the jury verdict for the defendants, observing along the way that "our confidence in Smith's convictions is not diminished in the least. We remain firmly convinced of the integrity of those guilty verdicts." 210 F. 3d, at 198.

Another "exonerated" murderer in the Gross study is Jeremy Sheets, convicted in Nebraska. His accomplice in the rape and murder of a girl had been secretly tape recorded; he "admitted that he drove the car used in the murder . . . , and implicated Sheets in the murder." *Sheets* v. *Butera*, 389 F. 3d 772, 775 (CA8 2004). The accomplice was arrested and eventually described the murder in greater detail, after which a plea agreement was arranged, conditioned on the accomplice's full cooperation. *Ibid.* The resulting taped confession, which implicated Sheets, was "[t]he crucial portion of the State's case," *State* v. *Sheets*, 260 Neb. 325, 327, 618 N. W. 2d 117, 122 (2000). But the accomplice committed suicide in jail, depriving Sheets of the opportunity to cross-examine him. This, the Nebraska Supreme Court held, ren-

dered the evidence inadmissible under the Sixth Amendment. *Id.*, at 328, 335–351, 618 N. W. 2d, at 123, 127–136. After the central evidence was excluded, the State did not retry Sheets. *Sheets* v. *Butera*, 389 F. 3d, at 776. Sheets brought a § 1983 claim; the U. S. Court of Appeals for the Eighth Circuit affirmed the District Court's grant of summary judgment against him. *Id.*, at 780. Sheets also sought the $1,000 he had been required to pay to the Nebraska Victim's Compensation Fund; the State Attorney General—far from concluding that Sheets had been "exonerated" and was entitled to the money—refused to return it. The court action left open the possibility that Sheets could be retried, and the Attorney General did "not believe the reversal on the ground of improper admission of evidence . . . is a favorable disposition of charges," Neb. Op. Atty. Gen. No. 01036 (Nov. 9), 2001 WL 1503144, *3.

In its inflation of the word "exoneration," the Gross article hardly stands alone; mischaracterization of reversible error as actual innocence is endemic in abolitionist rhetoric, and other prominent catalogues of "innocence" in the death-penalty context suffer from the same defect. Perhaps the best known of them is the List of Those Freed From Death Row, maintained by the Death Penalty Information Center. See http://www.deathpenaltyinfo.org/article.php?scid=6&did=110. This includes the cases from the Gross article described above, but also enters some dubious candidates of its own. Delbert Tibbs is one of them. We considered his case in *Tibbs* v. *Florida*, 457 U. S. 31 (1982), concluding that the Double Jeopardy Clause does not bar a retrial when a conviction is "revers[ed] based on the weight, rather than the sufficiency, of the evidence," *id.*, at 32. The case involved a man and a woman hitchhiking together in Florida. A driver who picked them up sodomized and raped the woman, and killed her boyfriend. She eventually escaped and positively identified Tibbs. See *id.*, at 32–33. The Florida Supreme

Court reversed the conviction on a 4-to-3 vote. *Tibbs* v. *State*, 337 So. 2d 788 (1976). The Florida courts then grappled with whether Tibbs could be retried without violating the Double Jeopardy Clause. The Florida Supreme Court determined not only that there was no double-jeopardy problem, 397 So. 2d 1120, 1127 (1981) *(per curiam)*, but that the *very basis on which it had reversed the conviction was no longer valid law*, *id.*, at 1125, and that its action in "reweigh[ing] the evidence" in Tibbs' case had been "clearly improper," *id.*, at 1126. After we affirmed the Florida Supreme Court, however, the State felt compelled to drop the charges. The state attorney explained this to the Florida Commission on Capital Cases: "'By the time of the retrial, [the] witness/victim . . . had progressed from a marijuana smoker to a crack user and I could not put her up on the stand, so I declined to prosecute. Tibbs, in my opinion, was never an innocent man wrongfully accused. He was a lucky human being. He was guilty, he was lucky and now he is free. His 1974 conviction was not a miscarriage of justice.'" Florida Commission on Capital Cases, Case Histories: A Review of 24 Individuals Released From Death Row 136–137 (rev. Sept. 10, 2002), http://www.floridacapitalcases.state.fl.us/Publications/innocentsproject.pdf. Other state officials involved made similar points. *Id.*, at 137.

Of course, even with its distorted concept of what constitutes "exoneration," the claims of the Gross article are fairly modest: Between 1989 and 2003, the authors identify 340 "exonerations" *nationwide*—not just for capital cases, mind you, nor even just for murder convictions, but for various felonies. Gross 529. Joshua Marquis, a district attorney in Oregon, recently responded to this article as follows:

> "[L]et's give the professor the benefit of the doubt: let's assume that he understated the number of innocents by roughly a factor of 10, that instead of 340 there were 4,000 people in prison who weren't involved in the crime

> in any way. During that same 15 years, there were more than 15 million felony convictions across the country. That would make the error rate .027 percent—or, to put it another way, a success rate of 99.973 percent." The Innocent and the Shammed, N. Y. Times, Jan. 26, 2006, p. A23.

The dissent's suggestion that capital defendants are *especially* liable to suffer from the lack of 100% perfection in our criminal justice system is implausible. Capital cases are given especially close scrutiny at every level, which is why in most cases many years elapse before the sentence is executed. And of course capital cases receive special attention in the application of executive clemency. Indeed, one of the arguments made by abolitionists is that the process of finally completing all the appeals and reexaminations of capital sentences is so lengthy, and thus so expensive for the State, that the game is not worth the candle. The proof of the pudding, of course, is that as far as anyone can determine (and many are looking), *none* of the cases included in the .027% error rate for American verdicts involved a capital defendant erroneously executed.

Since 1976 there have been approximately a half million murders in the United States. In that time, 7,000 murderers have been sentenced to death; about 950 of them have been executed; and about 3,700 inmates are currently on death row. See Marquis, The Myth of Innocence, 95 J. Crim. L. & C. 501, 518 (2005). As a consequence of the sensitivity of the criminal justice system to the due-process rights of defendants sentenced to death, almost two-thirds of all death sentences are overturned. See *ibid.* "Virtually none" of these reversals, however, are attributable to a defendant's "'actual innocence.'" *Ibid.* Most are based on legal errors that have little or nothing to do with guilt. See *id.*, at 519–520. The studies cited by the dissent demonstrate nothing more.

Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum. This explains why those ideologically driven to ferret out and proclaim a mistaken modern execution have not a single verifiable case to point to, whereas it is easy as pie to identify plainly guilty murderers who have been set free. The American people have determined that the good to be derived from capital punishment—in deterrence, and perhaps most of all in the meting out of condign justice for horrible crimes—outweighs the risk of error. It is no proper part of the business of this Court, or of its Justices, to second-guess that judgment, much less to impugn it before the world, and less still to frustrate it by imposing judicially invented obstacles to its execution.

JUSTICE STEVENS, dissenting.

Having joined Justice Blackmun's dissent from the plurality's opinion in *Walton* v. *Arizona*, 497 U. S. 639, 649–652 (1990), I necessarily also subscribe to the views expressed by JUSTICE SOUTER today. I write separately for two reasons: to explain why agreement with Justice Blackmun's dissent is fully consistent with refusing to read *Walton* as "control[ling]," but see *ante*, at 169 (opinion of the Court), and to explain why the grant of certiorari in this case was a misuse of our discretion.

Under Justice Blackmun's understanding of Arizona law, *Walton* did present exactly the same issue before us today. The Arizona statute at issue required the judge to impose death upon finding aggravating factors if "'there are no mitigating circumstances sufficiently substantial to call for leniency.'" 497 U. S., at 644 (quoting Ariz. Rev. Stat. Ann.

§ 13–703(E) (West 1989)). In Justice Blackmun's view, Arizona case law indicated "that a defendant's mitigating evidence will be deemed 'sufficiently substantial to call for leniency' only if the mitigating factors 'outweigh' those in aggravation." 497 U. S., at 687. Accordingly, Justice Blackmun believed that we confronted the constitutionality of a statute that mandated death when the scales were evenly balanced. *Ibid.*

But Justice Blackmun never concluded that the plurality similarly read Arizona case law as "requir[ing] a capital sentence in a case where aggravating and mitigating circumstances are evenly balanced." *Id.*, at 688. To the contrary, he observed that "the plurality does not even acknowledge that this is the dispositive question." *Ibid.* Because Justice Blackmun did not read the plurality opinion as confronting the problem of equipoise that he believed Arizona law to present, my join of his dissent is consistent with my conclusion that *stare decisis* does not bind us today. As JUSTICE SOUTER explains, *post*, at 203–204, n. 1 (dissenting opinion), the *Walton* plurality painstakingly avoided an express endorsement of a rule that allows a prosecutor to argue, and allows a judge to instruct the jury, that if the scales are evenly balanced when the choice is between life and death, the law requires the more severe penalty.

There is a further difference between this case and *Walton*—one that should have kept us from granting certiorari in the first place. In *Walton*, the defendant petitioned for certiorari, and our grant enabled us to consider whether the Arizona Supreme Court had adequately protected his rights under the Federal Constitution. In this case, by contrast, the State of Kansas petitioned us to review a ruling of its own Supreme Court on the grounds that the Kansas court had granted more protection to a Kansas litigant than the Federal Constitution required. A policy of judicial restraint would allow the highest court of the State to be the final

decisionmaker in a case of this kind. See *Brigham City* v. *Stuart*, 547 U. S. 398, 409 (2006) (STEVENS, J., concurring).

There is a remarkable similarity between the decision to grant certiorari in this case and our comparable decision in *California* v. *Ramos*, 463 U. S. 992 (1983). In *Ramos*, we reviewed a decision of the California Supreme Court that had invalidated a standard jury instruction concerning the Governor's power to commute life without parole sentences—an instruction that was unique to California. By a vote of 5 to 4, the Court reversed the judgment of the state court, concluding—somewhat ironically—that "the wisdom of the decision to permit juror consideration of possible commutation is best left to the States." *Id.*, at 1014.

In response I asked, as I do again today, "what harm would have been done to the administration of justice by state courts if the [Kansas] court had been left undisturbed in its determination[?]" *Id.*, at 1030. "If it were true that this instruction may make the difference between life and death in a case in which the scales are otherwise evenly balanced, that is a reason why the instruction should not be given—not a reason for giving it." *Ibid.* "No matter how trivial the impact of the instruction may be, it is fundamentally wrong for the presiding judge at the trial—who should personify the evenhanded administration of justice—to tell the jury, indirectly to be sure, that doubt concerning the proper penalty should be resolved in favor of [death]." *Ibid.*

As in *Ramos*, in this case "no rule of law commanded the Court to grant certiorari." *Id.*, at 1031. Furthermore, "[n]o other State would have been required to follow the [Kansas] precedent if it had been permitted to stand. Nothing more than an interest in facilitating the imposition of the death penalty in [Kansas] justified this Court's exercise of its discretion to review the judgment of the [Kansas] Supreme Court." *Ibid.* And "[t]hat interest, in my opinion, is not sufficient to warrant this Court's review of the validity of a

jury instruction when the wisdom of giving that instruction is plainly a matter that is best left to the States." *Ibid.**

We decided *Ramos* on the same day as *Michigan* v. *Long*, 463 U. S. 1032 (1983). Prior to that time, "we had virtually no interest" in criminal cases where States sought to set aside the rulings of their own courts. *Id.*, at 1069 (STEVENS,

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*JUSTICE SCALIA takes issue with my approach, suggesting that the federal interests vindicated by our review are equally weighty whether the state court found for the defendant or for the State. *Ante*, at 182–185 (concurring opinion). In so doing, he overlooks the separate federal interest in ensuring that no person be convicted or sentenced in violation of the Federal Constitution—an interest entirely absent when the State is the petitioner. It is appropriate—and certainly impartial, but see *ante*, at 185—to take this difference in federal interests into account in considering whether to grant a petition for writ of certiorari.

JUSTICE SCALIA also fails to explain why there is such an urgent need "to ensure the integrity and uniformity of federal law." *Ante*, at 183. If this perceived need is a "primary basis for the Constitution's allowing us to be accorded jurisdiction to review state-court decisions," *ibid.* (citing Art. III, § 2, cls. 1 and 2), then one would think that the First Judiciary Act would have given us jurisdiction to review all decisions based on the Federal Constitution coming out of state courts. But it did not. Unconcerned about JUSTICE SCALIA's "crazy quilt," *ante*, at 185, the First Congress only provided us with jurisdiction over such cases "where [there] is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, *and the decision is in favour of such their validity.*" Act of Sept. 24, 1789, § 25, 1 Stat. 85 (emphasis added). Not until 1914 did we have jurisdiction over decisions from state courts which arguably overprotected federal constitutional rights at the expense of state laws. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790; see also *Delaware* v. *Van Arsdall*, 475 U. S. 673, 694–697 (1986) (STEVENS, J., dissenting). Even then, our review was only by writ of certiorari, whereas until 1988 defendants had a right to *appeal* to us in cases in which state courts had upheld the validity of state statutes challenged on federal constitutional grounds. See 28 U. S. C. § 1257 (1982 ed.). In other words, during the entire period between 1789 and 1988, the laws enacted by Congress placed greater weight on the vindication of federal rights than on the interest in the uniformity of federal law.

J., dissenting). Although in recent years the trend has been otherwise, I continue to hope "that a future Court will recognize the error of this allocation of resources," *id.*, at 1070, and return to our older and better practice of restraint.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

I

Kansas's capital sentencing statute provides that a defendant "shall be sentenced to death" if, by unanimous vote, "the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances . . . exist and . . . that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist." Kan. Stat. Ann. § 21–4624(e) (1995). The Supreme Court of Kansas has read this provision to require imposition of the death penalty "[i]n the event of equipoise, [that is,] the jury's determination that the balance of any aggravating circumstances and any mitigating circumstances weighed equal." 278 Kan. 520, 534, 102 P. 3d 445, 457 (2004) (case below); see also *State* v. *Kleypas*, 272 Kan. 894, 1016, 40 P. 3d 139, 232 (2001) *(per curiam)* (stating that the language of § 21–4624(e) "provides that in doubtful cases the jury must return a sentence of death"). Given this construction, the state court held the law unconstitutional on the ground that the Eighth Amendment requires that a "'tie g[o] to the defendant' when life or death is at issue." *Ibid.* Because I agree with the Kansas justices that the Constitution forbids a mandatory death penalty in what they describe as "doubtful cases," when aggravating and mitigating factors are of equal weight, I respectfully dissent.[1]

[1] The majority views *Walton* v. *Arizona*, 497 U. S. 639 (1990), as having decided this issue. But *Walton* is ambiguous on this point; while the Court there approved Arizona's practice of placing the burden on capital defendants to prove, "by a preponderance of the evidence, the existence

II

More than 30 years ago, this Court explained that the Eighth Amendment's guarantee against cruel and unusual punishment barred imposition of the death penalty under statutory schemes so inarticulate that sentencing discretion produced wanton and freakish results. See *Furman* v. *Georgia*, 408 U. S. 238, 309–310 (1972) (Stewart, J., concurring) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random handful" of individuals). The Constitution was held to require, instead, a system structured to produce reliable, *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion), rational, *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), and rationally reviewable, *Woodson*, *supra*, at 303, determinations of sentence.

Decades of back-and-forth between legislative experiment and judicial review have made it plain that the constitutional demand for rationality goes beyond the minimal requirement to replace unbounded discretion with a sentencing structure; a State has much leeway in devising such a structure and in selecting the terms for measuring relative culpability, but a system must meet an ultimate test of constitutional reliability in producing "'a reasoned moral response to the defendant's background, character, and crime,'" *Penry* v. *Lynaugh*, 492 U. S. 302, 319 (1989) (quoting *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'Connor, J., concurring); emphasis deleted); cf. *Gregg* v. *Georgia*, 428 U. S. 153, 206 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (sanctioning

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of mitigating circumstances sufficiently substantial to call for leniency," *id.*, at 649 (plurality opinion), it did not quantify the phrase "sufficiently substantial." Justice Blackmun clearly thought otherwise, see *id.*, at 687 (dissenting opinion), but he cried a greater foul than one can get from the majority opinion. *Stare decisis* does not control this case.

sentencing procedures that "focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant"). The Eighth Amendment, that is, demands both form and substance, both a system for decision and one geared to produce morally justifiable results.

The State thinks its scheme is beyond questioning, whether as to form or substance, for it sees the tie-breaker law as equivalent to the provisions examined in *Blystone* v. *Pennsylvania*, 494 U. S. 299 (1990), and *Boyde* v. *California*, 494 U. S. 370 (1990), where we approved statutes that required a death sentence upon a jury finding that aggravating circumstances outweighed mitigating ones. But the crucial fact in those systems was the predominance of the aggravators, and our recognition of the moral rationality of a mandatory capital sentence based on that finding is no authority for giving States free rein to select a different conclusion that will dictate death.

Instead, the constitutional demand for a reasoned moral response requires the state statute to satisfy two criteria that speak to the issue before us now, one governing the character of sentencing evidence, and one going to the substantive justification needed for a death sentence. As to the first, there is an obligation in each case to inform the jury's choice of sentence with evidence about the crime as actually committed and about the specific individual who committed it. See *Spaziano* v. *Florida*, 468 U. S. 447, 460, and n. 7 (1984). Since the sentencing choice is, by definition, the attribution of particular culpability to a criminal act and defendant, as distinct from the general culpability necessarily implicated by committing a given offense, see *Penry*, *supra*, at 327–328; *Spaziano*, *supra*, at 460; *Zant* v. *Stephens*, 462 U. S. 862, 879 (1983), the sentencing decision must turn on the uniqueness of the individual defendant and on the details of the crime, to which any resulting choice of death must be "directly" related, *Penry*, *supra*, at 319.

Second, there is the point to which the particulars of crime and criminal are relevant: within the category of capital crimes, the death penalty must be reserved for "the worst of the worst." See, *e. g.*, *Roper* v. *Simmons*, 543 U. S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution'" (quoting *Atkins* v. *Virginia*, 536 U. S. 304, 319 (2002))). One object of the structured sentencing proceeding required in the aftermath of *Furman* is to eliminate the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty, *Penry*, *supra*, at 328–329, and the essence of the sentencing authority's responsibility is to determine whether the response to the crime and defendant "must be death," *Spaziano*, *supra*, at 461; cf. *Gregg*, *supra*, at 184 (joint opinion of Stewart, Powell, and STEVENS, JJ.). Of course, in the moral world of those who reject capital punishment in principle, a death sentence can never be a moral imperative. The point, however, is that within our legal and moral system, which allows a place for the death penalty, "must be death" does not mean "may be death."

Since a valid capital sentence thus requires a choice based upon unique particulars identifying the crime and its perpetrator as heinous to the point of demanding death even within the class of potentially capital offenses, the State's provision for a tiebreaker in favor of death fails on both counts. The dispositive fact under the tiebreaker is not the details of the crime or the unique identity of the individual defendant. The determining fact is not directly linked to a particular crime or particular criminal at all; the law operates merely on a jury's finding of equipoise in the State's own selected considerations for and against death. Nor does the tiebreaker identify the worst of the worst, or even purport to reflect any evidentiary showing that death must be the reasoned moral response; it does the opposite. The statute

produces a death sentence exactly when a sentencing impasse demonstrates as a matter of law that the jury does not see the evidence as showing the worst sort of crime committed by the worst sort of criminal, in a combination heinous enough to demand death. It operates, that is, when a jury has applied the State's chosen standards of culpability and mitigation and reached nothing more than what the Supreme Court of Kansas calls a "tie," *Kleypas*, 272 Kan., at 1016, 40 P. 3d, at 232 (internal quotation marks omitted). It mandates death in what that court identifies as "doubtful cases," *ibid.* The statute thus addresses the risk of a morally unjustifiable death sentence, not by minimizing it as precedent unmistakably requires, but by guaranteeing that in equipoise cases the risk will be realized, by "placing a 'thumb [on] death's side of the scale,'" *Sochor* v. *Florida*, 504 U. S. 527, 532 (1992) (quoting *Stringer* v. *Black*, 503 U. S. 222, 232 (1992); alteration in original).

In Kansas, when a jury applies the State's own standards of relative culpability and cannot decide that a defendant is among the most culpable, the state law says that equivocal evidence is good enough and the defendant must die. A law that requires execution when the case for aggravation has failed to convince the sentencing jury is morally absurd, and the Court's holding that the Constitution tolerates this moral irrationality defies decades of precedent aimed at eliminating freakish capital sentencing in the United States.

III

That precedent, demanding reasoned moral judgment, developed in response to facts that could not be ignored, the kaleidoscope of life and death verdicts that made no sense in fact or morality in the random sentencing before *Furman* was decided in 1972. See 408 U. S., at 309–310 (Stewart, J., concurring). Today, a new body of fact must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate, for the period starting in

1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests. We cannot face up to these facts and still hold that the guarantee of morally justifiable sentencing is hollow enough to allow maximizing death sentences, by requiring them when juries fail to find the worst degree of culpability: when, by a State's own standards and a State's own characterization, the case for death is "doubtful."

A few numbers from a growing literature will give a sense of the reality that must be addressed. When the Governor of Illinois imposed a moratorium on executions in 2000, 13 prisoners under death sentences had been released since 1977 after a number of them were shown to be innocent, as described in a report which used their examples to illustrate a theme common to all 13, of "relatively little solid evidence connecting the charged defendants to the crimes." State of Illinois, G. Ryan, Governor, Report of the Governor's Commission on Capital Punishment: Recommendations Only 7 (Apr. 2002) (hereinafter Report); see also *id.*, at 5–6, 7–9. During the same period, 12 condemned convicts had been executed. Subsequently the Governor determined that four more death row inmates were innocent. See *id.*, at 5–6; Warden, Illinois Death Penalty Reform, 95 J. Crim. L. & C. 381, 382, and n. 6 (2005).[2] Illinois had thus wrongly con-

[2] The Illinois Report emphasizes the difference between exoneration of a convict because of actual innocence, and reversal of a judgment because of legal error affecting conviction or sentence but not inconsistent with guilt in fact. See Report 9 (noting that, apart from the 13 released men, a "broader review" discloses that more than half of the State's death penalty cases "were reversed at some point in the process"). More importantly, it takes only a cursory reading of the Report to recognize that it describes men released who were demonstrably innocent or convicted on grossly unreliable evidence. Of one, the Report notes "two other persons were subsequently convicted in Wisconsin of" the murders. *Id.*, at 8. Of two others, the Report states that they were released after "DNA tests revealed that none of them were the source of the semen found in the victim. That same year, two other men confessed to the crime, pleaded

victed and condemned even more capital defendants than it had executed, but it may well not have been otherwise unique; one recent study reports that between 1989 and 2003, 74 American prisoners condemned to death were exonerated, Gross, Jacoby, Matheson, Montgomery, & Patil, Exonerations in the United States 1989 Through 2003, 95 J. Crim. L. & C. 523, 531 (2006) (hereinafter Gross), many of them cleared by DNA evidence, *ibid.*[3] Another report states that "more

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guilty and were sentenced to life in prison, and a third was tried and convicted for the crime." *Ibid.* Of yet another, the Report says that "another man subsequently confessed to the crime for which [the released man] was convicted. He entered a plea of guilty and is currently serving a prison term for that crime." *Id.*, at 9.

A number were subject to judgments as close to innocence as any judgments courts normally render. In the case of one of the released men, the Supreme Court of Illinois found the evidence insufficient to support his conviction. See *People* v. *Smith*, 185 Ill. 2d 532, 708 N. E. 2d 365 (1999). Several others obtained acquittals, and still more simply had the charges against them dropped, after receiving orders for new trials.

At least 2 of the 13 were released at the initiative of the executive. We can reasonably assume that a State under no obligation to do so would not release into the public a person against whom it had a valid conviction and sentence unless it were certain beyond all doubt that the person in custody was not the perpetrator of the crime. The reason that the State would forgo even a judicial forum in which defendants would demonstrate grounds for vacating their convictions is a matter of common sense: evidence going to innocence was conclusive.

[3]The authors state the criteria for their study: "As we use the term, 'exoneration' is an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted. The exonerations we have studied occurred in four ways: (1) In forty-two cases governors (or other appropriate executive officers) issued pardons based on evidence of the defendants' innocence. (2) In 263 cases criminal charges were dismissed by courts after new evidence of innocence emerged, such as DNA. (3) In thirty-one cases the defendants were acquitted at a retrial on the basis of evidence that they had no role in the crimes for which they were originally convicted. (4) In four cases, states posthumously acknowledged the innocence of defendants who had already died in prison . . . ." Gross 524 (footnote omitted). The authors exclude from their list of exonerations "any case in which a dismissal or an acquittal appears to have been

than 110" death row prisoners have been released since 1973 upon findings that they were innocent of the crimes charged, and "[h]undreds of additional wrongful convictions in potentially capital cases have been documented over the past century." Lanier & Acker, Capital Punishment, the Moratorium Movement, and Empirical Questions, 10 Psychology, Public Policy & Law 577, 593 (2004). Most of these wrongful convictions and sentences resulted from eyewitness misidentification, false confession, and (most frequently) perjury, Gross 544, 551–552, and the total shows that among all prosecutions homicide cases suffer an unusually high incidence of false conviction, *id.*, at 532, 552, probably owing to the combined difficulty of investigating without help from the victim, intense pressure to get convictions in homicide cases, and the corresponding incentive for the guilty to frame the innocent, *id.*, at 532.

We are thus in a period of new empirical argument about how "death is different," *Gregg*, 428 U. S., at 188 (joint opinion of Stewart, Powell, and STEVENS, JJ.): not only would these false verdicts defy correction after the fatal moment, the Illinois experience shows them to be remarkable in number, and they are probably disproportionately high in capital cases. While it is far too soon for any generalization about the soundness of capital sentencing across the country, the cautionary lesson of recent experience addresses the tie-breaking potential of the Kansas statute: the same risks of falsity that infect proof of guilt raise questions about sen-

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based on a decision that while the defendant was not guilty of the charges in the original conviction, he did play a role in the crime and may be guilty of some lesser crime that is based on the same conduct. For our purposes, a defendant who is acquitted of murder on retrial, but convicted of involuntary manslaughter, has not been exonerated. We have also excluded any case in which a dismissal was entered in the absence of strong evidence of factual innocence, or in which—despite such evidence—there was unexplained physical evidence of the defendant's guilt." *Id.*, at 524, n. 4.

tences, when the circumstances of the crime are aggravating factors and bear on predictions of future dangerousness.

In the face of evidence of the hazards of capital prosecution, maintaining a sentencing system mandating death when the sentencer finds the evidence pro and con to be in equipoise is obtuse by any moral or social measure. And unless application of the Eighth Amendment no longer calls for reasoned moral judgment in substance as well as form, the Kansas law is unconstitutional.

Syllabus

WASHINGTON *v.* RECUENCO

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 05–83. Argued April 17, 2006—Decided June 26, 2006

After respondent threatened his wife with a handgun, he was convicted of second-degree assault based on the jury's finding that he had assaulted her "with a deadly weapon." A "firearm" qualifies as a "deadly weapon" under Washington law, but nothing in the verdict form specifically required the jury to find that respondent had engaged in assault with a "firearm," as opposed to any other kind of "deadly weapon." Nevertheless, the state trial court applied a 3-year firearm enhancement to respondent's sentence, rather than the 1-year enhancement that specifically applies to assault with a deadly weapon, based on the court's own factual findings that respondent was armed with a firearm. This Court then decided *Apprendi* v. *New Jersey*, 530 U. S. 466, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," *id.*, at 490, and *Blakely* v. *Washington*, 542 U. S. 296, clarifying that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict*," *id.*, at 303. Because the trial court could not have subjected respondent to a firearm enhancement based only on the jury's finding that respondent was armed with a "deadly weapon," the State conceded a Sixth Amendment *Blakely* violation before the Washington Supreme Court, but urged the court to find the *Blakely* error harmless. In vacating respondent's sentence and remanding for sentencing based solely on the deadly weapon enhancement, however, the court declared *Blakely* error to be "structural error," which will always invalidate a conviction under *Sullivan* v. *Louisiana*, 508 U. S. 275, 279.

Held:

1. Respondent's argument that this Court lacks power to reverse because the Washington Supreme Court's judgment rested on adequate and independent state-law grounds is rejected. It is far from clear that respondent is correct that at the time of his conviction, state law provided no procedure for a jury to determine whether a defendant was armed with a firearm, so that it is impossible to conduct harmless-error analysis on the *Blakely* error in his case. The correctness of respondent's interpretation, however, is not determinative of the question the State Supreme Court decided and on which this Court granted review,

i. e., whether *Blakely* error can ever be deemed harmless. If respondent's reading of Washington law is correct, that merely suggests that he will be able to demonstrate that the *Blakely* violation *in this particular case* was not harmless. See *Chapman* v. *California*, 386 U. S. 18, 24. But it does not mean that *Blakely* error—which is of the same nature, whether it involves a fact that state law permits to be submitted to the jury or not—is structural, or that this Court is precluded from deciding that question. Thus, the Court need not resolve this open question of Washington law. Pp. 216–218.

2. Failure to submit a sentencing factor to the jury is not "structural" error. If a criminal defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that most constitutional errors are subject to harmless-error analysis. *E. g.*, *Neder* v. *United States*, 527 U. S. 1, 8. Only in rare cases has this Court ruled an error "structural," thus requiring automatic reversal. In *Neder*, the Court held that failure to submit an element of an offense to the jury—there, the materiality of false statements as an element of the federal crimes of filing a false income tax return, mail fraud, wire fraud, and bank fraud, see *id.*, at 20–25—is not structural, but is subject to *Chapman*'s harmless-error rule, 527 U. S., at 7–20. This case is indistinguishable from *Neder*. *Apprendi* makes clear that "[a]ny possible distinction between an 'element' of a felony . . . and a 'sentencing factor' was unknown . . . during the years surrounding our Nation's founding." 530 U. S., at 478. Accordingly, the Court has treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt. *Id.*, at 483–484. The only difference between this case and *Neder* is that there the prosecution failed to prove the materiality element beyond a reasonable doubt, while here the prosecution failed to prove the "armed with a firearm" sentencing factor beyond a reasonable doubt. Assigning this distinction constitutional significance cannot be reconciled with *Apprendi*'s recognition that elements and sentencing factors must be treated the same. Respondent attempts unpersuasively to distinguish *Neder* on the ground that the jury there returned a guilty verdict on the offenses for which the defendant was sentenced, whereas here the jury returned a guilty verdict only on the offense of second-degree assault, and an affirmative answer to the sentencing question whether respondent was armed with a deadly weapon. Because Neder's jury did not find him guilty of each of the elements of the offenses with which he was charged, its verdict is no more fairly described as a complete finding of guilt than is the verdict here. See 527 U. S., at 31. Pp. 218–222.

154 Wash. 2d 156, 110 P. 3d 188, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, SOUTER, BREYER, and ALITO, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 222. STEVENS, J., filed a dissenting opinion, *post*, p. 223. GINSBURG, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 224.

James M. Whisman argued the cause for petitioner. With him on the briefs were *Norm Maleng* and *Brian M. McDonald.*

Patricia A. Millett argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Clement, Assistant Attorney General Fisher, Deputy Solicitor General Dreeben,* and *Kannon K. Shanmugam.*

Gregory C. Link, by appointment of the Court, 546 U. S. 1087, argued the cause for respondent. With him on the brief were *Thomas M. Kummerow* and *Jeffrey L. Fisher.**

JUSTICE THOMAS delivered the opinion of the Court.

Respondent Arturo Recuenco was convicted of assault in the second degree based on the jury's finding that he assaulted his wife "with a deadly weapon." App. 13. The

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*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *John W. Suthers,* Attorney General of Colorado, *Allison H. Eid,* Solicitor General, and *John D. Seidel,* Assistant Attorney General, by *Christopher L. Morano,* Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *David W. Márquez* of Alaska, *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *Bill Lockyer* of California, *Carl C. Danberg* of Delaware, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Thomas J. Miller* of Iowa, *Phill Kline* of Kansas, *G. Steven Rowe* of Maine, *Michael A. Cox* of Michigan, *Mike McGrath* of Montana, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Lawrence E. Long* of South Dakota, *Paul G. Summers* of Tennessee, *Mark L. Shurtleff* of Utah, and *William Sorrell* of Vermont; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson.*

Robert N. Hochman, Pamela Harris, and *Sheryl Gordon McCloud* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging affirmance.

trial court applied a 3-year firearm enhancement to respondent's sentence based on its own factual findings, in violation of *Blakely* v. *Washington*, 542 U. S. 296 (2004). On appeal, the Supreme Court of Washington vacated the sentence, concluding that *Blakely* violations can never be harmless. We granted certiorari to review this conclusion, 546 U. S. 960 (2005), and now reverse.

I

On September 18, 1999, respondent fought with his wife, Amy Recuenco. After screaming at her and smashing their stove, he threatened her with a gun. Based on this incident, the State of Washington charged respondent with assault in the second degree, *i. e.*, "intentiona[l] assault . . . with a deadly weapon, to-wit: a handgun." App. 3. Defense counsel proposed, and the court accepted, a special verdict form that directed the jury to make a specific finding whether respondent was "armed with a deadly weapon at the time of the commission of the crime." *Id.*, at 13. A "firearm" qualifies as a "deadly weapon" under Washington law. Wash. Rev. Code § 9.94A.602 (2004). But nothing in the verdict form specifically required the jury to find that respondent had engaged in assault with a "firearm," as opposed to any other kind of "deadly weapon." The jury returned a verdict of guilty on the charge of assault in the second degree, and answered the special verdict question in the affirmative. App. 10, 13.

At sentencing, the State sought the low end of the standard range sentence for assault in the second degree (three months). It also sought a mandatory 3-year enhancement because respondent was armed with a "firearm," § 9.94A.533(3)(b), rather than requesting the 1-year enhancement that would attend the jury's finding that respondent was armed with a deadly weapon, § 9.94A.533(4)(b). The trial court concluded that respondent satisfied the condition for the firearm enhancement, and accordingly imposed a total sentence of 39 months.

Before the Supreme Court of Washington heard respondent's appeal, we decided *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and *Blakely*, *supra*. In *Apprendi*, we held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U. S., at 490. In *Blakely*, we clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 542 U. S., at 303 (emphasis in original). Because the trial court in this case could not have subjected respondent to a firearm enhancement based only on the jury's finding that respondent was armed with a "deadly weapon," the State conceded before the Supreme Court of Washington that a Sixth Amendment violation occurred under *Blakely*. 154 Wash. 2d 156, 162–163, 110 P. 3d 188, 191 (2005). See also Tr. of Oral Arg. 10–11.

The State urged the Supreme Court of Washington to find the *Blakely* error harmless and, accordingly, to affirm the sentence. In *State* v. *Hughes*, 154 Wash. 2d 118, 110 P. 3d 192 (2005), however, decided the same day as the present case, the Supreme Court of Washington declared *Blakely* error to be "'structural' erro[r]" which "'will always invalidate the conviction.'" 154 Wash. 2d, at 142, 110 P. 3d, at 205 (quoting *Sullivan* v. *Louisiana*, 508 U. S. 275, 279 (1993)). As a result, the court refused to apply harmless-error analysis to the *Blakely* error infecting respondent's sentence. Instead, it vacated his sentence and remanded for sentencing based solely on the deadly weapon enhancement. 154 Wash. 2d, at 164, 110 P. 3d, at 192.

II

Before reaching the merits, we must address respondent's argument that we are without power to reverse the judgment of the Supreme Court of Washington because that

judgment rested on adequate and independent state-law grounds. Respondent claims that at the time of his conviction, Washington state law provided no procedure for a jury to determine whether a defendant was armed with a firearm. Therefore, he contends, it is impossible to conduct harmless-error analysis on the *Blakely* error in his case. Respondent bases his position on *Hughes*, in which the Supreme Court of Washington refused to "create a procedure to empanel juries on remand to find aggravating factors because the legislature did not provide such a procedure and, instead, explicitly assigned such findings to the trial court." 154 Wash. 2d, at 151, 110 P. 3d, at 209. Respondent contends that, likewise, the Washington Legislature provided no procedure by which a jury could decide at trial whether a defendant was armed with a firearm, as opposed to a deadly weapon.

It is far from clear that respondent's interpretation of Washington law is correct. See *State* v. *Pharr*, 131 Wash. App. 119, 124–125, 126 P. 3d 66, 69 (2006) (affirming the trial court's imposition of a firearm enhancement when the jury's special verdict reflected a finding that the defendant was armed with a firearm). In *Hughes*, the Supreme Court of Washington carefully avoided reaching the conclusion respondent now advocates, instead expressly recognizing that "[w]e are presented only with the question of the appropriate remedy on *remand*—we do not decide here whether juries may be given special verdict forms or interrogatories to determine aggravating factors at trial." 154 Wash. 2d, at 149, 110 P. 3d, at 208. Accordingly, *Hughes* does not appear to foreclose the possibility that an error could be found harmless because the jury which convicted the defendant would have concluded, if given the opportunity, that a defendant was armed with a firearm.

The correctness of respondent's interpretation of Washington law, however, is not determinative of the question that the Supreme Court of Washington decided and on which we granted review, *i. e.*, whether *Blakely* error can ever be

deemed harmless. If respondent is correct that Washington law does not provide for a procedure by which his jury could have made a finding pertaining to his possession of a firearm, that merely suggests that respondent will be able to demonstrate that the *Blakely* violation *in this particular case* was not harmless. See *Chapman* v. *California*, 386 U. S. 18, 24 (1967). But that does not mean that *Blakely* error—which is of the same nature, whether it involves a fact that state law permits to be submitted to the jury or not—is structural, or that we are precluded from deciding that question. Thus, we need not resolve this open question of Washington law.[1]

III

We have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, "'most constitutional errors can be harmless.'" *Neder* v. *United States*, 527 U. S. 1, 8 (1999) (quoting *Arizona* v. *Fulminante*, 499 U. S. 279, 306 (1991)). "'[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.'" 527 U. S., at 8 (quoting *Rose* v. *Clark*, 478 U. S. 570, 579 (1986)). Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal.[2] In such cases, the error "neces-

[1] Respondent's argument that, as a matter of *state* law, the *Blakely* v. *Washington*, 542 U. S. 296 (2004), error was not harmless remains open to him on remand.

[2] See *Neder* v. *United States*, 527 U. S. 1, 8 (1999) (citing *Johnson* v. *United States*, 520 U. S. 461, 468 (1997), in turn citing *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (complete denial of counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (biased trial judge); *Vasquez* v. *Hillery*, 474 U. S. 254 (1986) (racial discrimination in selection of grand jury); *McKaskle* v. *Wiggins*, 465 U. S. 168 (1984) (denial of self-representation at trial); *Waller* v. *Georgia*, 467 U. S. 39 (1984) (denial of public trial); *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993) (defective reasonable-doubt instruction)).

sarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, *supra*, at 9 (emphasis deleted).

We recently considered whether an error similar to that which occurred here was structural in *Neder*, *supra*. Neder was charged with mail fraud, in violation of 18 U. S. C. § 1341; wire fraud, in violation of § 1343; bank fraud, in violation of § 1344; and filing a false income tax return, in violation of 26 U. S. C. § 7206(1). 527 U. S., at 6. At Neder's trial, the District Court instructed the jury that it "'need not consider'" the materiality of any false statements to convict Neder of the tax offenses or bank fraud, because materiality "'is not a question for the jury to decide.'" *Ibid.* The court also failed to include materiality as an element of the offenses of mail fraud and wire fraud. *Ibid.* We determined that the District Court erred because under *United States* v. *Gaudin*, 515 U. S. 506 (1995), materiality is an element of the tax offense that must be found by the jury. We further determined that materiality is an element of the mail fraud, wire fraud, and bank fraud statutes, and thus must be submitted to the jury to support conviction of those crimes as well. *Neder*, 527 U. S., at 20. We nonetheless held that harmless-error analysis applied to these errors, because "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.*, at 9. See also *Schriro* v. *Summerlin*, 542 U. S. 348, 355–356 (2004) (rejecting the claim that *Ring* v. *Arizona*, 536 U. S. 584 (2002), which applied *Apprendi* to hold that a jury must find the existence of aggravating factors necessary to impose the death penalty, was a "'"watershed rul[e] of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding,'" in part because we could not "confidently say that judicial factfinding *seriously* diminishes accuracy").

The State and the United States urge that this case is indistinguishable from *Neder*. We agree. Our decision in *Apprendi* makes clear that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 530 U. S., at 478 (footnote omitted). Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt. *Id.*, at 483–484. The only difference between this case and *Neder* is that in *Neder*, the prosecution failed to prove the element of materiality to the jury beyond a reasonable doubt, while here the prosecution failed to prove the sentencing factor of "armed with a firearm" to the jury beyond a reasonable doubt. Assigning this distinction constitutional significance cannot be reconciled with our recognition in *Apprendi* that elements and sentencing factors must be treated the same for Sixth Amendment purposes.[3]

Respondent attempts to distinguish *Neder* on the ground that, in that case, the jury returned a guilty verdict on the offense for which the defendant was sentenced. Here, in contrast, the jury returned a guilty verdict only on the offense of assault in the second degree, and an affirmative answer to the sentencing question whether respondent was armed with a deadly weapon. Accordingly, respondent ar-

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[3] Respondent also attempts to evade *Neder* by characterizing this as a case of charging error, rather than of judicial factfinding. Brief for Respondent 16–19. Because the Supreme Court of Washington treated the error as one of the latter type, we treat it similarly. See 154 Wash. 2d 156, 159–161, 110 P. 3d 188, 189–190 (2005) (considering "whether imposition of a firearm enhancement without a jury finding that Recuenco was armed with a firearm beyond a reasonable doubt violated Recuenco's Sixth Amendment right to a jury trial as defined by *Apprendi* v. *New Jersey*, 530 U. S. 466 [(2000)], and its progeny," and whether the *Apprendi* and *Blakely* error, if uninvited, could "be deemed harmless").

gues, the trial court's action in his case was the equivalent of a directed verdict of guilt on an offense (assault in the second degree while armed with a firearm) greater than the one for which the jury convicted him (assault in the second degree while armed with any deadly weapon). Rather than asking whether the jury would have returned the same verdict absent the error, as in *Neder*, respondent contends that applying harmless-error analysis here would " 'hypothesize a guilty verdict that [was] never in fact rendered,' " in violation of the jury-trial guarantee. Brief for Respondent 27 (quoting *Sullivan*, 508 U. S., at 279).

We find this distinction unpersuasive. Certainly, in *Neder*, the jury purported to have convicted the defendant of the crimes with which he was charged and for which he was sentenced. However, the jury was precluded "from making a finding on the *actual* element of the offense." 527 U. S., at 10. Because Neder's jury did not find him guilty of each of the elements of the offenses with which he was charged, its verdict is no more fairly described as a complete finding of guilt of the crimes for which the defendant was sentenced than is the verdict here. See *id.*, at 31 (SCALIA, J., concurring in part and dissenting in part) ("[S]ince all crimes require proof of more than one element to establish guilt . . . it follows that trial by jury means determination by a jury that *all elements* were proved. The Court does not contest this"). Put another way, we concluded that the error in *Neder* was subject to harmless-error analysis, even though the District Court there not only failed to submit the question of materiality to the jury, but also mistakenly concluded that the jury's verdict was a complete verdict of guilt on the charges and imposed sentence accordingly. Thus, in order to find for respondent, we would have to conclude that harmless-error analysis would apply if Washington had a crime labeled "assault in the second degree while armed with a firearm," and the trial court erroneously instructed the

jury that it was not required to find a deadly weapon or a firearm to convict, while harmless error does not apply in the present case. This result defies logic.[4]

* * *

Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error. Accordingly, we reverse the judgment of the Supreme Court of Washington and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring.

The opinions for the Court in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), *Blakely* v. *Washington*, 542 U. S. 296 (2004), and their progeny were accompanied by dissents. The Court does not revisit these cases today, and it describes their holdings accurately. On these premises, the Court's analysis is correct. Cf. *Ring* v. *Arizona*, 536 U. S. 584, 613 (2002) (KENNEDY, J., concurring). With these observations I join the Court's opinion.

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[4] The Supreme Court of Washington reached the contrary conclusion based on language from *Sullivan*. See *State* v. *Hughes*, 154 Wash. 2d 118, 144, 110 P. 3d 192, 205 (2005) ("'There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate'" (quoting *Sullivan*, 508 U. S., at 280)). Here, as in *Neder*, "this strand of reasoning in *Sullivan* does provide support for [respondent]'s position." 527 U. S., at 11. We recognized in *Neder*, however, that a broad interpretation of our language from *Sullivan* is inconsistent with our case law. 527 U. S., at 11–15. Because the jury in *Neder*, as here, failed to return a complete verdict of guilty beyond a reasonable doubt, our rejection of Neder's proposed application of the language from *Sullivan* compels our rejection of this argument here.

JUSTICE STEVENS, dissenting.

Like *Brigham City* v. *Stuart*, 547 U. S. 398 (2006), and *Kansas* v. *Marsh*, *ante*, p. 163, this is a case in which the Court has granted review in order to make sure that a State's highest court has not granted its citizens any greater protection than the bare minimum required by the Federal Constitution. Ironically, the issue in this case is not whether respondent's federal constitutional rights were violated—that is admitted—it is whether the Washington Supreme Court's chosen remedy for the violation is mandated by federal law. As the discussion in Part II of the Court's opinion demonstrates, whether we even have jurisdiction to decide that question is not entirely clear. But even if our expansionist post-*Michigan* v. *Long* jurisprudence supports our jurisdiction to review the decision below, see 463 U. S. 1032 (1983), there was surely no need to reach out to decide this case. The Washington Supreme Court can, of course, reinstate the same judgment on remand, either for the reasons discussed in Part II of the Court's opinion, see *ante*, at 217–218, and n. 1, or because that court chooses, as a matter of state law, to adhere to its view that the proper remedy for *Blakely* errors, see *Blakely* v. *Washington*, 542 U. S. 296 (2004), is automatic reversal of the unconstitutional portion of a defendant's sentence. Moreover, because the Court does not address the strongest argument in respondent's favor—namely, that *Blakely* errors are structural because they deprive criminal defendants of sufficient notice regarding the charges they must defend against, see *ante*, at 220, n. 3—this decision will have a limited impact on other cases.

As I did in *Brigham City* and *Marsh*, I voted to deny certiorari in this case. Given the Court's decision to reach the merits, however, I would affirm for the reasons stated in JUSTICE GINSBURG's opinion, which I join.

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins, dissenting.

Between trial and sentencing, respondent Arturo Recuenco's prosecutor switched gears. The information charged Recuenco with assault in the second degree, and further alleged that at the time of the assault, he was armed with a deadly weapon. App. 3. Without enhancement, the assault charge Recuenco faced carried a sentence of three to nine months, *id.*, at 15; Wash. Rev. Code §§ 9.94A.510, 9A.36.021(1)(c) (2004); the deadly weapon enhancement added one mandatory year to that sentence, § 9.94A.533(4)(b).[1] The trial judge instructed the jury on both the assault charge and the deadly weapon enhancement. App. 7, 8. In connection with the enhancement, the judge gave the jurors a special verdict form and instructed them to answer "Yes or No" to one question only: "Was the defendant . . . armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?" *Id.*, at 13. The jury answered: "Yes." *Ibid.*

Because the deadly weapon Recuenco held was in fact a handgun, the prosecutor might have charged, as an alternative to the deadly weapon enhancement, that at the time of the assault, Recuenco was "armed with a firearm." That enhancement would have added three mandatory years to the assault sentence. § 9.94A.533(3)(b). The information charging Recuenco, however, did not allege the firearm enhancement. The jury received no instruction on it and was given no special verdict form posing the question: Was the defendant armed with a firearm at the time of the commission of the crime of Assault in the Second Degree? See 154 Wash. 2d 156, 160, 110 P. 3d 188, 190 (2005) ("The jury was not asked to, and therefore did not, return a special verdict

[1] Since Recuenco was charged, some of the relevant statutory provisions have been renumbered, without material revision. For convenience, we follow the Court's and the parties' citation practice and refer to the current provisions.

that Recuenco committed the assault while armed with a firearm.").

The prosecutor not only failed to charge Recuenco with assault while armed with a firearm and to request a special verdict tied to the firearm enhancement. He also informed the court, after the jury's verdict and in response to the defendant's motion to vacate: "The method under which the state is alleging and the jury found the assaul[t] committed was by use of a deadly weapon." App. 35. Leaving no doubt, the prosecutor further clarified: "[I]n the crime charged and the enhancement the state alleged, there is no elemen[t] of a firearm. The element is assault with a deadly weapon." *Ibid.* Recuenco was thus properly charged, tried, and convicted of second-degree assault while armed with a deadly weapon. It was a solid case; no gap was left to fill.

Nevertheless, at sentencing, the prosecutor requested, and the trial judge imposed, a three-year mandatory enhancement for use of a firearm. *Ibid.* Recuenco objected to imposition of the firearm enhancement "without notice . . . and a jury finding." 154 Wash. 2d, at 161, 110 P. 3d, at 190. Determining that there was no warrant for elevation of the charge once the trial was over, the Washington Supreme Court "remand[ed] for resentencing based solely on the deadly weapon enhancement which is supported by the jury's special verdict." *Id.*, at 164, 110 P. 3d, at 192. I would affirm that judgment. No error marred the case presented at trial. The prosecutor charged, and the jury found Recuenco guilty of, a complete and clearly delineated offense: "assault in the second degree, being armed with a deadly weapon." The "harmless-error" doctrine was not designed to allow dislodgment of that error-free jury determination.

I

Under Washington law and practice, assault with a deadly weapon and assault with a firearm are discrete charges, at-

tended by discrete instructions. As the Court observes, *ante*, at 215, a charge of second-degree assault while armed with a deadly weapon, § 9.94A.533(4)(b), subjects a defendant to an additional year in prison, and a charge of second-degree assault while armed with a firearm, § 9.94A.533(3)(b), calls for an additional term of three years. "Deadly weapon," Washington law provides, encompasses any "implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death," including, *inter alia*, a "pistol, revolver, or any other firearm." § 9.94A.602. "Firearm" is defined, more particularly, to mean "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." § 9.41.010(1). A handgun (the weapon Recuenco held), it thus appears, might have been placed in both categories.[2]

Washington Pattern Jury Instructions, Criminal (WPIC) (West Supp. 2005), set out three instructions for cases in which "an enhanced sentence is sought on the basis that the defendant was armed with a 'deadly weapon,'" WPIC § 2.06 (note on use): Deadly Weapon—General, § 2.07; Deadly Weapon—Knife, § 2.07.01; Deadly Weapon—Firearm, § 2.07.02. When the prosecutor seeks an enhancement based on the charge that "the defendant was armed with a 'firearm,'" § 2.06, trial courts are directed to a different instruction, one keyed to the elevated enhancement, § 2.10.01.

Matching special verdict forms for trial-court use are also framed in the WPIC. When a "deadly weapon" charge is made, whether generally or with a knife or firearm, the pre-

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[2] But see App. 38. When the prosecutor, post-trial but presentence, made it plain that he was seeking the three-year firearm enhancement rather than the one-year deadly weapon enhancement, Recuenco objected that the statutory definition of "firearm" had not been read to the jury, and that the prosecutor had submitted no evidence showing that Recuenco's handgun was "designed to fire a projectile by explosive such as gunpowder." *Ibid.*

scribed form asks the jury: "Was the defendant (defendant's name) armed with a deadly weapon at the time of the commission of the crime [in Count ——]?" § 190.01. When a "firearm" charge is made, the jury is asked: "Was the defendant (defendant's name) armed with a firearm at the time of the commission of the crime [in Count ——]?" § 190.02.

In Recuenco's case, the jury was instructed, in line with the "deadly weapon" charge made by the prosecutor, App. 6–7, and the special verdict form given to the jury matched that instruction. The form read:

> "We, the jury, return a special verdict by answering as follows:
>
> "Was the defendant ARTURO R. RECUENCO armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?
>
> "ANSWER: [YES] (Yes or No)." *Id.*, at 13.

No "firearm" instruction, WPIC § 2.10.01 (West Supp. 2005), was given to Recuenco's jury, nor was the jury given the special verdict form matching that instruction, § 190.02; see *supra*, at 226, n. 2.

II

In the Court's view, "this case is indistinguishable from *Neder* [v. *United States*, 527 U. S. 1 (1999)]." *Ante*, at 220. In that case, the trial judge made a finding necessary to fill a gap in an incomplete jury verdict. One of the offenses involved was tax fraud; the element missing from the jury's instruction was the materiality of the defendant's alleged misstatements. Under the mistaken impression that materiality was a question reserved for the court, the trial judge made the finding himself. In fact in *Neder*, materiality was not in dispute. See 527 U. S., at 7; see also *id.*, at 15 (Neder "d[id] not suggest that he would introduce any evidence bearing upon the issue of materiality if so allowed."). "Reversal without any consideration of the effect of the error upon the verdict would [have] sen[t] the case back for re-

trial—a retrial not focused at all on the issue of materiality, but on contested issues on which the jury [had been] properly instructed." *Ibid.* The Court concluded that the Sixth Amendment did not command that recycling.

Here, in contrast to *Neder*, the charge, jury instructions, and special verdict contained no omissions; they set out completely all ingredients of the crime of second-degree assault with a deadly weapon. There is no occasion for any retrial, and no cause to displace the jury's entirely complete verdict with, in essence, a conviction on an uncharged greater offense.

III

The standard form judgment completed and signed by the trial judge in this case included the following segment:

> "**SPECIAL VERDICT or FINDING(S)**:
>
> "(b) [ ] A special verdict/finding for being armed with a **Firearm** was rendered on Count(s) —.
>
> "(c) [**X**] A special verdict/finding for being armed with a **Deadly Weapon** other than a firearm was rendered on Count(s) I." App. 14.

Count I was identified on the judgment form as "ASSAULT IN THE 2ND DEGREE." *Ibid.* Despite the "X" placed next to the "Deadly Weapon" special verdict/finding, and the blanks left unfilled in the "Firearm" special verdict/finding lines, the trial judge imposed a sentence of 39 months (3 months for the assault, 36 months as the enhancement).

Had the prosecutor alternatively charged both enhancements, and had the judge accurately and adequately instructed on both, giving the jury a special verdict form on each of the two enhancements, the jury would have had the prerogative to choose the lower enhancement. Specifically, the jury could have answered "Yes" (as it in fact did, see *supra*, at 227) to the "armed with a deadly weapon" inquiry while returning no response to the alternative "firearm" inquiry. See *supra*, at 226, and n. 2 (Washington's statutory

definition of "deadly weapon" overlaps definition of "firearm"); cf. *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 573 (1977) ("[R]egardless of how overwhelmingly the evidence may point in that direction[, t]he trial judge is . . . barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused."). Today's decision, advancing a greater excluded (from jury control) offense notion, diminishes the jury's historic capacity "to prevent the punishment from getting too far out of line with the crime." *United States* v. *Maybury*, 274 F. 2d 899, 902 (CA2 1960) (Friendly, J.); see also *Blakely* v. *Washington*, 542 U. S. 296, 306 (2004) (recognizing jury's role "as circuitbreaker in the State's machinery of justice").

* * *

In sum, Recuenco, charged with one crime (assault with a deadly weapon), was convicted of another (assault with a firearm), *sans* charge, jury instruction, or jury verdict. That disposition, I would hold, is incompatible with the Fifth and Sixth Amendments, made applicable to the States by the Fourteenth Amendment. I would therefore affirm the judgment of the Supreme Court of the State of Washington.

Syllabus

RANDALL ET AL. *v.* SORRELL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 04–1528. Argued February 28, 2006—Decided June 26, 2006*

Vermont's Act 64 stringently limits both the amounts that candidates for state office may spend on their campaigns and the amounts that individuals, organizations, and political parties may contribute to those campaigns. Soon after Act 64 became law, the petitioners—individuals who have run for state office, citizens who vote in state elections and contribute to campaigns, and political parties and committees participating in state politics—brought this suit against the respondents, state officials charged with enforcing the Act. The District Court held that Act 64's expenditure limits violate the First Amendment, see *Buckley* v. *Valeo*, 424 U. S. 1, and that the Act's limits on political parties' contributions to candidates were unconstitutional, but found the other contribution limits constitutional. The Second Circuit held that *all* of the Act's contribution limits are constitutional, ruled that the expenditure limits may be constitutional because they are supported by compelling interests in preventing corruption or its appearance and in limiting the time state officials must spend raising campaign funds, and remanded for the District Court to determine whether the expenditure limits were narrowly tailored to those interests.

Held: The judgment is reversed, and the cases are remanded.

382 F. 3d 91, reversed and remanded.

JUSTICE BREYER, joined by THE CHIEF JUSTICE and JUSTICE ALITO, concluded in Parts I, II–B–3, III, and IV that both of Act 64's sets of limitations are inconsistent with the First Amendment. Pp. 241–242, 244–263.

1. The expenditure limits violate the First Amendment's free speech guarantees under *Buckley*. Pp. 241–242, 244–246.

(a) In *Buckley*, the Court held, *inter alia*, that the Government's asserted interest in preventing "corruption and the appearance of corruption," 424 U. S., at 25, provided sufficient justification for the contribution limitations imposed on campaigns for federal office by the Federal Election Campaign Act of 1971, *id.*, at 23–38, but that FECA's expenditure limitations violated the First Amendment, *id.*, at 39–59.

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*Together with No. 04–1530, *Vermont Republican State Committee et al.* v. *Sorrell et al.*, and No. 04–1697, *Sorrell et al.* v. *Randall et al.*, also on certiorari to the same court.

The Court explained that the difference between the two kinds of limitations is that expenditure limits "impose significantly more severe restrictions on protected freedoms of political expression and association than" do contribution limits. *Id.*, at 23. Contribution limits, though a "marginal restriction," nevertheless leave the contributor "fre[e] to discuss candidates and issues." *Id.*, at 20–21. Expenditure limits, by contrast, impose "[a] restriction on the amount of money a person or group can spend on political communication," *id.*, at 19, and thereby necessarily "reduc[e] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached," *ibid.* For over 30 years, in considering the constitutionality of a host of campaign finance statutes, this Court has adhered to *Buckley*'s constraints, including those on expenditure limits. See, *e. g.*, *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 134. Pp. 241–242.

(b) The respondents argue unpersuasively that *Buckley* should be distinguished from the present cases on a ground they say *Buckley* did not consider: that expenditure limits help to protect candidates from spending too much time raising money rather than devoting that time to campaigning among ordinary voters. There is no significant basis for that distinction. Act 64's expenditure limits are not substantially different from those at issue in *Buckley*. Nor is Vermont's primary justification for imposing its expenditure limits significantly different from Congress' rationale for the *Buckley* limits: preventing corruption and its appearance. The respondents say unpersuasively that, had the *Buckley* Court considered the time protection rationale for expenditure limits, the Court would have upheld those limits in the FECA. The *Buckley* Court, however, was aware of the connection between expenditure limits and a reduction in fundraising time. And, in any event, the connection seems perfectly obvious. Under these circumstances, the respondents' argument amounts to no more than an invitation so to limit *Buckley*'s holding as effectively to overrule it. That invitation is declined. Pp. 244–246.

2. Act 64's contribution limits violate the First Amendment because those limits, in their specific details, burden protected interests in a manner disproportionate to the public purposes they were enacted to advance. Pp. 246–263.

(a) In upholding the $1,000 contribution limit before it, the *Buckley* Court recognized, *inter alia*, that such limits, unlike expenditure limits, "involv[e] little direct restraint on" the contributor's speech, 424 U. S., at 21, and are permissible as long as the government demonstrates that they are "closely drawn" to match a "sufficiently important interest," *id.*, at 25. It found that the interest there advanced, "prevent[ing] corruption" and its "appearance," was "sufficiently important" to justify the contribution limits, *id.*, at 25–26, and that those limits were "closely

drawn." Although recognizing that, in determining whether a particular contribution limit was "closely drawn," the amount, or level, of that limit could make a difference, see *id.*, at 21, the Court added that such "distinctions in degree become significant only when they . . . amount to differences in kind," *id.*, at 30. Pointing out that it had "no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000," *ibid.*, the Court found "no indication" that FECA's contribution limitations would have "any dramatic adverse effect on the funding of campaigns," *id.*, at 21. Since *Buckley*, the Court has consistently upheld contribution limits in other statutes, but has recognized that such limits might *sometimes* work more harm to protected First Amendment interests than their anticorruption objectives could justify, see, *e. g.*, *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 395–397. Pp. 246–248.

(b) Although the Court has "no scalpel to probe," 424 U. S., at 30, with exactitude whether particular contribution limits are too low and normally defers to the legislature in that regard, it must nevertheless recognize the existence of some lower bound, as *Buckley* acknowledges. While the interests served by contribution limits, preventing corruption and its appearance, "directly implicate the integrity of our electoral process," *McConnell*, *supra*, at 136, that does not simply mean the lower the limit, the better. Contribution limits that are too low also can harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability. Where there is strong indication in a particular case, *i. e.*, danger signs, that such risks exist (both present in kind and likely serious in degree), courts, including appellate courts, must review the record independently and carefully with an eye toward assessing the statute's "tailoring," *i. e.*, toward assessing the restrictions' proportionality. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 499. Danger signs that Act 64's contribution limits may fall outside tolerable First Amendment limits are present here. They are substantially lower than both the limits the Court has previously upheld and the comparable limits in force in other States. Consequently, the record must be examined to determine whether Act 64's contribution limits are "closely drawn" to match the State's interests. Pp. 248–253.

(c) The record demonstrates that, from a constitutional perspective, Act 64's contribution limits are too restrictive. Five sets of factors, taken together, lead to the conclusion that those limits are not narrowly tailored. *First*, the record suggests, though it does not conclusively prove, that Act 64's contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns. *Second*, Act 64's insistence that a political party and all of its

affiliates together abide by *exactly* the same low $200 to $400 contribution limits that apply to individual contributors threatens harm to a particularly important political right, the right to associate in a political party. See, *e. g.*, *California Democratic Party* v. *Jones*, 530 U. S. 567, 574. Although the Court upheld federal limits on political parties' contributions to candidates in *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, the limits there at issue were far less problematic, for they were significantly higher than Act 64's limits, see, *e. g.*, *id.*, at 438–439, and n. 3, and they were much higher than the federal limits on contributions from individuals to candidates, see *id.*, at 453. *Third*, Act 64's treatment of volunteer services aggravates the problem. Although the Act excludes uncompensated volunteer services from its "contribution" definition, it does not exclude the expenses volunteers incur, *e. g.*, travel expenses, in the course of campaign activities. The combination of very low contribution limits and the absence of an exception excluding volunteer expenses may well impede a campaign's ability effectively to use volunteers, thereby making it more difficult for individuals to associate in this way. Cf. *Buckley*, *supra*, at 22. *Fourth*, unlike the contribution limits upheld in *Shrink*, Act 64's limits are not adjusted for inflation, but decline in real value each year. A failure to index limits means that limits already suspiciously low will almost inevitably become too low over time. *Fifth*, nowhere in the record is there any special justification for Act 64's low and restrictive contribution limits. Rather, the basic justifications the State has advanced in support of such limits are those present in *Buckley*. Indeed, other things being equal, one might reasonably believe that a contribution of, say, $250 (or $450) to a candidate's campaign was less likely to prove a corruptive force than the far larger contributions at issue in the other campaign finance cases the Court has considered. Pp. 253–262.

(d) It is not possible to sever some of the Act's contribution limit provisions from others that might remain fully operative. Doing so would require the Court to write words into the statute (inflation indexing), to leave gaping loopholes (no limits on party contributions), or to foresee which of many different possible ways the Vermont Legislature might respond to the constitutional objections to Act 64. In these circumstances, the legislature likely would not have intended the Court to set aside the statute's contribution limits. The legislature is free to rewrite those provisions to address the constitutional difficulties here identified. Pp. 262–263.

JUSTICE BREYER, joined by THE CHIEF JUSTICE in Parts II–B–1 and II–B–2, rejected the respondents' argument that *Buckley* should, in effect, be overruled because subsequent experience has shown that contri-

bution limits alone cannot effectively deter corruption or its appearance. *Stare decisis*, the basic legal principle commanding judicial respect for a court's earlier decisions and their rules of law, prevents the overruling of *Buckley*. Adherence to precedent is the norm; departure from it is exceptional, requiring "special justification," *Arizona* v. *Rumsey*, 467 U. S. 203, 212, especially where, as here, the principle at issue has become settled through iteration and reiteration over a long period. There is no special justification here. Subsequent case law has not made *Buckley* a legal anomaly or otherwise undermined its basic legal principles. Cf. *Dickerson* v. *United States*, 530 U. S. 428, 443. Nor is there any demonstration that circumstances have changed so radically as to undermine *Buckley*'s critical factual assumptions. The respondents have not shown, for example, any dramatic increase in corruption or its appearance in Vermont; nor have they shown that expenditure limits are the only way to attack that problem. Cf. *McConnell*, 540 U. S. 93. Finally, overruling *Buckley* now would dramatically undermine the considerable reliance that Congress and state legislatures have placed upon it in drafting campaign finance laws. And this Court has followed *Buckley*, upholding and applying its reasoning in later cases. Pp. 242–244.

JUSTICE ALITO agreed that Act 64's expenditure and contribution limits violate the First Amendment, but concluded that respondents' backup argument asking this Court to revisit *Buckley* v. *Valeo*, 424 U. S. 1, need not be reached because they have failed to address considerations of *stare decisis*. Pp. 263–264.

JUSTICE KENNEDY agreed that Vermont's limitations on campaign expenditures and contributions violate the First Amendment, but concluded that, given his skepticism regarding this Court's campaign finance jurisprudence, see, *e. g.*, *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 286–287, 313, it is appropriate for him to concur only in the judgment. Pp. 264–265.

JUSTICE THOMAS, joined by JUSTICE SCALIA, agreed that Vermont's Act 64 is unconstitutional, but disagreed with the plurality's rationale for striking down that statute. *Buckley* v. *Valeo*, 424 U. S. 1, provides insufficient protection to political speech, the core of the First Amendment, is therefore illegitimate and not protected by *stare decisis*, and should be overruled and replaced with a standard faithful to the Amendment. This Court erred in *Buckley* when it distinguished between contribution and expenditure limits, finding the former to be a less severe infringement on First Amendment rights. See, *e. g.*, *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 410–418. Both the contribution and expenditure restrictions of Act 64 should be subjected to strict scrutiny, which they would fail. See, *e. g.*, *Colorado Republican Fed-*

Syllabus

eral Campaign Comm. v. *Federal Election Comm'n*, 518 U. S. 604, 640–641. Pp. 265–273.

BREYER, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., joined, and in which ALITO, J., joined except as to Parts II–B–1 and II–B–2. ALITO, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 263. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 264. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, *post*, p. 265. STEVENS, J., filed a dissenting opinion, *post*, p. 273. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined, and in which STEVENS, J., joined as to Parts II and III, *post*, p. 281.

James Bopp, Jr., argued the cause for petitioners in Nos. 04–1528 and 04–1530. On the briefs for petitioners in No. 04–1528 were *Peter F. Langrock*, *Mitchell L. Pearl*, *Mark J. Lopez*, *Steven R. Shapiro*, and *Joel M. Gora*. *Mr. Bopp* filed briefs for the Vermont Republican State Committee et al., petitioners in No. 04–1530.

William H. Sorrell, Attorney General of Vermont, *pro se*, argued the cause for respondents in Nos. 04–1528 and 04–1530 and cross-petitioners in No. 04–1697. With him on the brief were *Timothy B. Tomasi*, *Eve Jacobs-Carnahan*, and *Bridget C. Asay*, Assistant Attorneys General, and *Carter G. Phillips*.

Brenda Wright argued the cause for respondents/cross-petitioners Vermont Public Interest Research Group et al. With her on the brief were *Lisa J. Danetz*, *John C. Bonifaz*, *Thomas C. Goldstein*, and *Scott P. Lewis*.†

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†A brief of *amicus curiae* urging reversal in No. 04–1528 was filed for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt*, *Laurence E. Gold*, and *Michael B. Trister*.

Briefs of *amici curiae* urging affirmance were filed for Heidi Behrens-Benedict by *Scott N. Auby* in No. 04–1528; and for Senator John F. Reed by *Donald B. Verrilli, Jr.*, in Nos. 04–1528 and 04–1530.

Briefs of *amici curiae* were filed in all cases for the State of Connecticut et al. by *Richard Blumenthal*, Attorney General of Connecticut, and *Jane R. Rosenberg*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Mike*

JUSTICE BREYER announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE joins, and in which JUSTICE ALITO joins except as to Parts II–B–1 and II–B–2.

We here consider the constitutionality of a Vermont campaign finance statute that limits both (1) the amounts that candidates for state office may spend on their campaigns (expenditure limitations) and (2) the amounts that individuals, organizations, and political parties may contribute to those campaigns (contribution limitations). Vt. Stat. Ann., Tit. 17, § 2801 *et seq.* (2002). We hold that both sets of limitations are inconsistent with the First Amendment. Well-established precedent makes clear that the expenditure limits violate the First Amendment. *Buckley* v. *Valeo*, 424 U. S. 1, 54–58 (1976) *(per curiam)*. The contribution limits

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Beebe of Arkansas, *Bill Lockyer* of California, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Gregory D. Stumbo* of Kentucky, *J. Joseph Curran, Jr.*, of Maryland, *Mike Hatch* of Minnesota, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *W. A. Drew Edmondson* of Oklahoma, *Patrick Lynch* of Rhode Island, *Peggy A. Lautenschlager* of Wisconsin, and *Patrick J. Crank* of Wyoming; for the Secretary of State of New Hampshire et al. by *Philip Allen Lacovara, Charles A. Rothfeld,* and *Daniel T. Brown;* for the Center for Competitive Politics et al. by *Erik S. Jaffe;* for the Center for Democracy and Election Management at American University by *Ilann M. Maazel;* for the Democratic National Committee by *Joseph E. Sandler;* for the Equal Justice Society et al. by *Martin R. Glick;* for the Republican National Committee by *Bobby R. Burchfield, M. Miller Baker,* and *Thomas J. Josefiak;* for ReclaimDemocracy.org by *Daniel J. H. Greenwood;* for TheRestofUs.org et al. by *Douglas R. M. Nazarian, Patricia A. Brannan,* and *Martha M. Tierney;* for Current and Former State Court Justices and Judges by *Deborah Goldberg;* for Bill Bradley et al. by *Mark C. Alexander, John J. Gibbons,* and *Lawrence S. Lustberg;* for Norman Dorsen et al. by *Burt Neuborne* and *Mr. Dorsen, pro se;* for Senator John McCain et al. by *Seth P. Waxman, Roger M. Witten, Randolph D. Moss, Bradley S. Phillips, Donald J. Simon, Alan Morrison, J. Gerald Hebert, Trevor Potter, Paul Ryan, Charles G. Curtis, Jr., Fred Wertheimer,* and *Scott L. Nelson;* and for Senator Mitch McConnell by *Theodore B. Olson* and *Douglas R. Cox.*

are unconstitutional because in their specific details (involving low maximum levels and other restrictions) they fail to satisfy the First Amendment's requirement of careful tailoring. *Id.*, at 25–30. That is to say, they impose burdens upon First Amendment interests that (when viewed in light of the statute's legitimate objectives) are disproportionately severe.

I

A

Prior to 1997, Vermont's campaign finance law imposed no limit upon the amount a candidate for state office could spend. It did, however, impose limits upon the amounts that individuals, corporations, and political committees could contribute to the campaign of such a candidate. Individuals and corporations could contribute no more than $1,000 to any candidate for state office. § 2805(a) (1996). Political committees, excluding political parties, could contribute no more than $3,000. § 2805(b). The statute imposed no limit on the amount that political parties could contribute to candidates.

In 1997, Vermont enacted a more stringent campaign finance law, Pub. Act No. 64, codified at Vt. Stat. Ann., Tit. 17, § 2801 *et seq.* (2002) (hereinafter Act or Act 64), the statute at issue here. Act 64, which took effect immediately after the 1998 elections, imposes mandatory expenditure limits on the total amount a candidate for state office can spend during a "two-year general election cycle," *i. e.*, the primary plus the general election, in approximately the following amounts: governor, $300,000; lieutenant governor, $100,000; other statewide offices, $45,000; state senator, $4,000 (plus an additional $2,500 for each additional seat in the district); state representative (two-member district), $3,000; and state representative (single member district), $2,000. § 2805a(a). These limits are adjusted for inflation in odd-numbered years based on the Consumer Price Index. § 2805a(e). Incumbents seeking reelection to statewide office may spend no

more than 85% of the above amounts, and incumbents seeking reelection to the State Senate or House may spend no more than 90% of the above amounts. § 2805a(c). The Act defines "[e]xpenditure" broadly to mean the

> "payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid, for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates." § 2801(3).

With certain minor exceptions, expenditures over $50 made on a candidate's behalf by others count against the candidate's expenditure limit if those expenditures are "intentionally facilitated by, solicited by or approved by" the candidate's campaign. §§ 2809(b), (c). These provisions apply so as to count against a campaign's expenditure limit any spending by political parties or committees that is coordinated with the campaign and benefits the candidate. And any party expenditure that "primarily benefits six or fewer candidates who are associated with the political party" is "presumed" to be coordinated with the campaign and therefore to count against the campaign's expenditure limit. §§ 2809(b), (d).

Act 64 also imposes strict contribution limits. The amount any single individual can contribute to the campaign of a candidate for state office during a "two-year general election cycle" is limited as follows: governor, lieutenant governor, and other statewide offices, $400; state senator, $300; and state representative, $200. § 2805(a). Unlike its expenditure limits, Act 64's contribution limits are not indexed for inflation.

A political committee is subject to these same limits. *Ibid.* So is a political party, *ibid.*, defined broadly to include "any subsidiary, branch or local unit" of a party, as well as any "national or regional affiliates" of a party (taken separately or together). § 2801(5). Thus, for example, the stat-

ute treats the local, state, and national affiliates of the Democratic Party as if they were a single entity and limits their total contribution to a single candidate's campaign for governor (during the primary and the general election together) to $400.

The Act also imposes a limit of $2,000 upon the amount any individual can give to a political party during a 2-year general election cycle. § 2805(a).

The Act defines "contribution" broadly in approximately the same way it defines "expenditure." § 2801(2). Any expenditure made on a candidate's behalf counts as a contribution to the candidate if it is "intentionally facilitated by, solicited by or approved by" the candidate. §§ 2809(a), (c). And a party expenditure that "primarily benefits six or fewer candidates who are associated with the" party is "presumed" to count against the party's contribution limits. §§ 2809(a), (d).

There are a few exceptions. A candidate's own contributions to the campaign and those of the candidate's family fall outside the contribution limits. § 2805(f). Volunteer services do not count as contributions. § 2801(2). Nor does the cost of a meet-the-candidate function, provided that the total cost for the function amounts to $100 or less. § 2809(d).

In addition to these expenditure and contribution limits, the Act sets forth disclosure and reporting requirements and creates a voluntary public financing system for gubernatorial elections. §§ 2803, 2811, 2821–2823, 2831, 2832, 2851–2856. None of these is at issue here. The Act also limits the amount of contributions a candidate, political committee, or political party can receive from out-of-state sources. § 2805(c). The lower courts held these out-of-state contribution limits unconstitutional, and the parties do not challenge that holding.

B

The petitioners are individuals who have run for state office in Vermont, citizens who vote in Vermont elections and

contribute to Vermont campaigns, and political parties and committees that participate in Vermont politics. Soon after Act 64 became law, they brought this lawsuit in Federal District Court against the respondents, state officials charged with enforcement of the Act. Several other private groups and individual citizens intervened in the District Court proceedings in support of the Act and are joined here as respondents as well.

The District Court agreed with the petitioners that the Act's expenditure limits violate the First Amendment. See *Buckley*, 424 U. S. 1. The court also held unconstitutional the Act's limits on the contributions of political parties to candidates. At the same time, the court found the Act's other contribution limits constitutional. *Landell* v. *Sorrell*, 118 F. Supp. 2d 459, 470 (Vt. 2000).

Both sides appealed. A divided panel of the Court of Appeals for the Second Circuit held that *all* of the Act's contribution limits are constitutional. It also held that the Act's expenditure limits may be constitutional. *Landell* v. *Sorrell*, 382 F. 3d 91 (2004). It found those limits supported by two compelling interests, namely, an interest in preventing corruption or the appearance of corruption and an interest in limiting the amount of time state officials must spend raising campaign funds. The Circuit then remanded the case to the District Court with instructions to determine whether the Act's expenditure limits were narrowly tailored to those interests.

The petitioners and respondents all sought certiorari. They asked us to consider the constitutionality of Act 64's expenditure limits, its contribution limits, and a related definitional provision. We agreed to do so. 545 U. S. 1165 (2005).

II

We turn first to the Act's expenditure limits. Do those limits violate the First Amendment's free speech guarantees?

A

In *Buckley* v. *Valeo*, *supra*, the Court considered the constitutionality of the Federal Election Campaign Act of 1971 (FECA), 86 Stat. 3, as amended, 2 U. S. C. § 431 *et seq.*, a statute that, much like the Act before us, imposed both expenditure and contribution limitations on campaigns for public office. The Court, while upholding FECA's contribution limitations as constitutional, held that the statute's expenditure limitations violated the First Amendment.

Buckley stated that both kinds of limitations "implicate fundamental First Amendment interests." 424 U. S., at 23. It noted that the Government had sought to justify the statute's infringement on those interests in terms of the need to prevent "corruption and the appearance of corruption." *Id.*, at 25; see also *id.*, at 55. In the Court's view, this rationale provided sufficient justification for the statute's contribution limitations, but it did not provide sufficient justification for the expenditure limitations.

The Court explained that the basic reason for this difference between the two kinds of limitations is that expenditure limitations "impose significantly more severe restrictions on protected freedoms of political expression and association than" do contribution limitations. *Id.*, at 23. Contribution limitations, though a "marginal restriction upon the contributor's ability to engage in free communication," nevertheless leave the contributor "fre[e] to discuss candidates and issues." *Id.*, at 20–21. Expenditure limitations, by contrast, impose "[a] restriction on the amount of money a person or group can spend on political communication during a campaign." *Id.*, at 19. They thereby necessarily "reduc[e] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Ibid.* Indeed, the freedom "to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far

and as often as one desires on a single tank of gasoline." *Id.*, at 19, n. 18.

The Court concluded that "[n]o governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by" the statute's expenditure limitations. *Id.*, at 55. It decided that the Government's primary justification for expenditure limitations, preventing corruption and its appearance, was adequately addressed by the Act's contribution limitations and disclosure requirements. *Ibid.* The Court also considered other governmental interests advanced in support of expenditure limitations. It rejected each. *Id.*, at 56–57. Consequently, it held that the expenditure limitations were "constitutionally invalid." *Id.*, at 58.

Over the last 30 years, in considering the constitutionality of a host of different campaign finance statutes, this Court has repeatedly adhered to *Buckley*'s constraints, including those on expenditure limits. See *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 134 (2003); *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 441 (2001) *(Colorado II)*; *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 386 (2000) *(Shrink)*; *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 610 (1996) *(Colorado I)* (plurality opinion); *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 259–260 (1986); *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 491 (1985); *California Medical Assn.* v. *Federal Election Comm'n*, 453 U. S. 182, 194–195 (1981) (plurality opinion).

B

1

The respondents recognize that, in respect to expenditure limits, *Buckley* appears to be a controlling—and unfavorable—precedent. They seek to overcome that precedent in

two ways. First, they ask us in effect to overrule *Buckley*. Post-*Buckley* experience, they believe, has shown that contribution limits (and disclosure requirements) alone cannot effectively deter corruption or its appearance; hence experience has undermined an assumption underlying that case. Indeed, the respondents have devoted several pages of their briefs to attacking *Buckley*'s holding on expenditure limits. See Brief for Respondent/Cross-Petitioner Vermont Public Interest Research Group et al. 6–39 (hereinafter VPIRG Brief) (arguing that "sound reasons exist to revisit the applicable standard of review" for expenditure limits); Brief for Respondent/Cross-Petitioner William H. Sorrell et al. 28–31 (hereinafter Sorrell Brief) (arguing that "the Court should revisit *Buckley* and consider alternative constitutional approaches to spending limits").

Second, in the alternative, they ask us to limit the scope of *Buckley* significantly by distinguishing *Buckley* from the present case. They advance as a ground for distinction a justification for expenditure limitations that, they say, *Buckley* did not consider, namely, that such limits help to protect candidates from spending too much time raising money rather than devoting that time to campaigning among ordinary voters. We find neither argument persuasive.

2

The Court has often recognized the "fundamental importance" of *stare decisis*, the basic legal principle that commands judicial respect for a court's earlier decisions and the rules of law they embody. See *Harris* v. *United States*, 536 U. S. 545, 556–557 (2002) (plurality opinion) (citing numerous cases). The Court has pointed out that *stare decisis* "'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *United States* v. *International Business Machines Corp.*, 517 U. S. 843, 856 (1996) (quoting *Payne* v.

Tennessee, 501 U. S. 808, 827 (1991)). *Stare decisis* thereby avoids the instability and unfairness that accompany disruption of settled legal expectations. For this reason, the rule of law demands that adhering to our prior case law be the norm. Departure from precedent is exceptional, and requires "special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). This is especially true where, as here, the principle has become settled through iteration and reiteration over a long period of time.

We can find here no such special justification that would require us to overrule *Buckley*. Subsequent case law has not made *Buckley* a legal anomaly or otherwise undermined its basic legal principles. Cf. *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000). We cannot find in the respondents' claims any demonstration that circumstances have changed so radically as to undermine *Buckley*'s critical factual assumptions. The respondents have not shown, for example, any dramatic increase in corruption or its appearance in Vermont; nor have they shown that expenditure limits are the only way to attack that problem. Cf. *McConnell* v. *FEC*, 540 U. S. 93. At the same time, *Buckley* has promoted considerable reliance. Congress and state legislatures have used *Buckley* when drafting campaign finance laws. And, as we have said, this Court has followed *Buckley*, upholding and applying its reasoning in later cases. Overruling *Buckley* now would dramatically undermine this reliance on our settled precedent.

For all these reasons, we find this a case that fits the *stare decisis* norm. And we do not perceive the strong justification that would be necessary to warrant overruling so well established a precedent. We consequently decline the respondents' invitation to reconsider *Buckley*.

3

The respondents also ask us to distinguish these cases from *Buckley*. But we can find no significant basis for that

distinction. Act 64's expenditure limits are not substantially different from those at issue in *Buckley*. In both instances the limits consist of a dollar cap imposed upon a candidate's expenditures. Nor is Vermont's primary justification for imposing its expenditure limits significantly different from Congress' rationale for the *Buckley* limits: preventing corruption and its appearance.

The sole basis on which the respondents seek to distinguish *Buckley* concerns a further supporting justification. They argue that expenditure limits are necessary in order to reduce the amount of time candidates must spend raising money. VPIRG Brief 16–20; Sorrell Brief 22–25. Increased campaign costs, together with the fear of a better-funded opponent, mean that, without expenditure limits, a candidate must spend too much time raising money instead of meeting the voters and engaging in public debate. *Buckley*, the respondents add, did not fully consider this justification. Had it done so, they say, the Court would have upheld, not struck down, FECA's expenditure limits.

In our view, it is highly unlikely that fuller consideration of this time protection rationale would have changed *Buckley*'s result. The *Buckley* Court was aware of the connection between expenditure limits and a reduction in fundraising time. In a section of the opinion dealing with FECA's public financing provisions, it wrote that Congress was trying to "free candidates from the rigors of fundraising." 424 U. S., at 91; see also *id.*, at 96 ("[L]imits on contributions necessarily increase the burden of fundraising," and "public financing" was designed in part to relieve Presidential candidates "from the rigors of soliciting private contributions"); *id.*, at 258–259 (White, J., concurring in part and dissenting in part) (same). The Court of Appeals' opinion and the briefs filed in this Court pointed out that a natural consequence of higher campaign expenditures was that "candidates were compelled to allow to fund raising increasing and extreme amounts of money and energy." *Buckley* v. *Valeo*, 519 F. 2d 821, 838

(CADC 1975); see also Brief for United States et al. as *Amici Curiae* in *Buckley* v. *Valeo*, O. T. 1975, Nos. 75–436 and 75–437, p. 36 ("Fund raising consumes candidate time that otherwise would be devoted to campaigning"). And, in any event, the connection between high campaign expenditures and increased fundraising demands seems perfectly obvious.

Under these circumstances, the respondents' argument amounts to no more than an invitation so to limit *Buckley*'s holding as effectively to overrule it. For the reasons set forth above, we decline that invitation as well. And, given *Buckley*'s continued authority, we must conclude that Act 64's expenditure limits violate the First Amendment.

III

We turn now to a more complex question, namely, the constitutionality of Act 64's contribution limits. The parties, while accepting *Buckley*'s approach, dispute whether, despite *Buckley*'s general approval of statutes that limit campaign contributions, Act 64's contribution limits are so severe that in the circumstances its particular limits violate the First Amendment.

A

As with the Act's expenditure limits, we begin with *Buckley*. In that case, the Court upheld the $1,000 contribution limit before it. *Buckley* recognized that contribution limits, like expenditure limits, "implicate fundamental First Amendment interests," namely, the freedoms of "political expression" and "political association." 424 U. S., at 15, 23. But, unlike expenditure limits (which "necessarily reduc[e] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached," *id.*, at 19), contribution limits "involv[e] little direct restraint on" the contributor's speech, *id.*, at 21. They do restrict "one aspect of the contributor's freedom of political association," namely, the contributor's ability to support a favored candidate, but they nonetheless "per-

mi[t] the symbolic expression of support evidenced by a contribution," and they do "not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.*, at 21, 24.

Consequently, the Court wrote, contribution limitations are permissible as long as the Government demonstrates that the limits are "closely drawn" to match a "sufficiently important interest." *Id.*, at 25. It found that the interest advanced in the case, "prevent[ing] corruption" and its "appearance," was "sufficiently important" to justify the statute's contribution limits. *Id.*, at 25–26.

The Court also found that the contribution limits before it were "closely drawn." It recognized that, in determining whether a particular contribution limit was "closely drawn," the amount, or level, of that limit could make a difference. Indeed, it wrote that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Id.*, at 21. But the Court added that such "distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.*, at 30. Pointing out that it had "'no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000,'" *ibid.*, the Court found "no indication" that the $1,000 contribution limitations imposed by the Act would have "any dramatic adverse effect on the funding of campaigns," *id.*, at 21. It therefore found the limitations constitutional.

Since *Buckley*, the Court has consistently upheld contribution limits in other statutes. *Shrink*, 528 U. S. 377 ($1,075 limit on contributions to candidates for Missouri state auditor); *California Medical Assn.*, 453 U. S. 182 ($5,000 limit on contributions to multicandidate political committees). The Court has recognized, however, that contribution limits might *sometimes* work more harm to protected First Amendment interests than their anticorruption objectives

could justify. See *Shrink, supra,* at 395–397; *Buckley, supra,* at 21. And individual Members of the Court have expressed concern lest too low a limit magnify the "reputation-related or media-related advantages of incumbency and thereby insulat[e] legislators from effective electoral challenge." *Shrink, supra,* at 403–404 (BREYER, J., joined by GINSBURG, J., concurring). In the cases before us, the petitioners challenge Act 64's contribution limits on that basis.

B

Following *Buckley,* we must determine whether Act 64's contribution limits prevent candidates from "amassing the resources necessary for effective [campaign] advocacy," 424 U. S., at 21; whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage; in a word, whether they are too low and too strict to survive First Amendment scrutiny. In answering these questions, we recognize, as *Buckley* stated, that we have "'no scalpel to probe'" each possible contribution level. *Id.,* at 30. We cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives. In practice, the legislature is better equipped to make such empirical judgments, as legislators have "particular expertise" in matters related to the costs and nature of running for office. *McConnell,* 540 U. S., at 137. Thus ordinarily we have deferred to the legislature's determination of such matters.

Nonetheless, as *Buckley* acknowledged, we must recognize the existence of some lower bound. At some point the constitutional risks to the democratic electoral process become too great. After all, the interests underlying contribution limits, preventing corruption and the appearance of corruption, "directly implicate the integrity of our electoral process." *McConnell, supra,* at 136 (internal quotation marks omitted). Yet that rationale does not simply mean "the lower the limit, the better." That is because contribution

limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability. Were we to ignore that fact, a statute that seeks to regulate campaign contributions could itself prove an obstacle to the very electoral fairness it seeks to promote. Thus, we see no alternative to the exercise of independent judicial judgment as a statute reaches those outer limits. And, where there is strong indication in a particular case, *i. e.*, danger signs, that such risks exist (both present in kind and likely serious in degree), courts, including appellate courts, must review the record independently and carefully with an eye toward assessing the statute's "tailoring," that is, toward assessing the proportionality of the restrictions. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 499 (1984) ("[A]n appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression' " (quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 284–286 (1964))).

We find those danger signs present here. As compared with the contribution limits upheld by the Court in the past, and with those in force in other States, Act 64's limits are sufficiently low as to generate suspicion that they are not closely drawn. The Act sets its limits per election cycle, which includes both a primary and a general election. Thus, in a gubernatorial race with both primary and final election contests, the Act's contribution limit amounts to $200 per election per candidate (with significantly lower limits for contributions to candidates for State Senate and House of Representatives, see *supra*, at 238). These limits apply both to contributions from individuals and to contributions from political parties, whether made in cash or in expenditures coordinated (or presumed to be coordinated) with the candidate. See *supra*, at 238–239.

These limits are well below the limits this Court upheld in *Buckley*. Indeed, in terms of real dollars (*i. e.*, adjusting for inflation), the Act's $200 per election limit on individual contributions to a campaign for governor is slightly more than one-twentieth of the limit on contributions to campaigns for federal office before the Court in *Buckley*. Adjusted to reflect its value in 1976 (the year *Buckley* was decided), Vermont's contribution limit on campaigns for statewide office (including governor) amounts to $113.91 per 2-year election cycle, or roughly $57 per election, as compared to the $1,000 per election limit on individual contributions at issue in *Buckley*. (The adjusted value of Act 64's limit on contributions from political parties to candidates for statewide office, again $200 per candidate per election, is just over one one-hundredth of the comparable limit before the Court in *Buckley*, $5,000 per election.) Yet Vermont's gubernatorial district—the entire State—is no smaller than the House districts to which *Buckley*'s limits applied. In 1976, the average congressional district contained a population of about 465,000. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 459 (1976) (Statistical Abstract) (describing results of 1970 census). Indeed, Vermont's population is 621,000—about one-third *larger*. Statistical Abstract 21 (2006) (describing Vermont's population in 2004).

Moreover, considered as a whole, Vermont's contribution limits are the lowest in the Nation. Act 64 limits contributions to candidates for statewide office (including governor) to $200 per candidate per election. We have found no State that imposes a lower per election limit. Indeed, we have found only seven States that impose limits on contributions to candidates for statewide office at or below $500 per election, more than twice Act 64's limit. Cf. Ariz. Rev. Stat. Ann. §16–905 (West Cum. Supp. 2005) ($760 per election cycle, or $380 per election, adjusted for inflation); Colo. Const., Art. XXVIII, §3 ($500 per election, adjusted for in-

flation); Fla. Stat. § 106.08(1)(a) (2003) ($500 per election); Me. Rev. Stat. Ann., Tit. 21–A, § 1015(1) (West Supp. 2005) ($500 for governor, $250 for other statewide office, per election); Mass. Gen. Laws, ch. 55, § 7A (West Cum. Supp. 2006) ($500 per year, or $250 per election); Mont. Code Ann. § 13–37–216(1)(a) (2005) ($500 for governor, $250 for other statewide office, per election); S. D. Codified Laws § 12–25–1.1 (2004) ($1,000 per year, or $500 per election). We are aware of no State that imposes a limit on contributions from political parties to candidates for statewide office lower than Act 64's $200 per candidate per election limit. Cf. Me. Rev. Stat. Ann., Tit. 21–A, § 1015(1) (next lowest: $500 for contribution from party to candidate for governor, $250 for contribution from party to candidate for other statewide office, both per election). Similarly, we have found only three States that have limits on contributions to candidates for state legislature below Act 64's $150 and $100 per election limits. Ariz. Rev. Stat. Ann. § 16–905 ($296 per election cycle, or $148 per election); Mont. Code Ann. § 13–37–216(1)(a) ($130 per election); S. D. Codified Laws § 12–25–1.1 ($250 per year, or $125 per election). And we are aware of no State that has a lower limit on contributions from political parties to state legislative candidates. Cf. Me. Rev. Stat. Ann., Tit. 21–A, § 1015(1) (next lowest: $250 per election).

Finally, Vermont's limit is well below the lowest limit this Court has previously upheld, the limit of $1,075 per election (adjusted for inflation every two years, see Mo. Rev. Stat. § 130.032.2 (Cum. Supp. 1998)) for candidates for Missouri state auditor. *Shrink*, 528 U. S. 377. The comparable Vermont limit of roughly $200 per election, not adjusted for inflation, is less than one-sixth of Missouri's current inflation-adjusted limit ($1,275).

We recognize that Vermont's population is much smaller than Missouri's. Indeed, Vermont is about one-ninth of the size of Missouri. Statistical Abstract 21 (2006). Thus, *per citizen*, Vermont's limit is slightly more generous. As of

2006, the ratio of the contribution limit to the size of the constituency in Vermont is .00064, while Missouri's ratio is .00044, 31% lower. Cf. App. 55 (doing same calculation in 2000).

But this does not necessarily mean that Vermont's limits are less objectionable than the limit upheld in *Shrink*. A campaign for state auditor is likely to be less costly than a campaign for governor; campaign costs do not automatically increase or decrease in precise proportion to the size of an electoral district. See App. 66 (1998 winning candidate for Vermont state auditor spent about $60,000; winning candidate for governor spent about $340,000); Opensecrets.org, The Big Picture, 2004 Cycle: Hot Races, available at http://www.opensecrets.org/bigpicture/hotraces.asp?cycle=2004 (as visited June 22, 2006, and available in Clerk of Court's case file) (U. S. Senate campaigns identified as competitive spend less per voter than U. S. House campaigns identified as competitive). Moreover, Vermont's limits, unlike Missouri's limits, apply in the same amounts to contributions made by political parties. Mo. Rev. Stat. § 130.032.4 (2000) (enacting limits on contributions from political parties to candidates 10 times higher than limits on contributions from individuals). And, as we have said, Missouri's (current) $1,275 per election limit, unlike Vermont's $200 per election limit, is indexed for inflation. See *supra*, at 251; see also Mo. Rev. Stat. § 130.032.2 (2000).

The factors we have mentioned offset any neutralizing force of population differences. At the very least, they make it difficult to treat *Shrink*'s (then) $1,075 limit as providing affirmative support for the lawfulness of Vermont's far lower levels. Cf. 528 U. S., at 404 (BREYER, J., concurring) (The *Shrink* "limit . . . is low enough to raise . . . a [significant constitutional] question"). And even were that not so, Vermont's failure to index for inflation means that Vermont's levels would soon be far lower than Missouri's regardless of the method of comparison.

In sum, Act 64's contribution limits are substantially lower than both the limits we have previously upheld and comparable limits in other States. These are danger signs that Act 64's contribution limits may fall outside tolerable First Amendment limits. We consequently must examine the record independently and carefully to determine whether Act 64's contribution limits are "closely drawn" to match the State's interests.

C

Our examination of the record convinces us that, from a constitutional perspective, Act 64's contribution limits are too restrictive. We reach this conclusion based not merely on the low dollar amounts of the limits themselves, but also on the statute's effect on political parties and on volunteer activity in Vermont elections. *Taken together,* Act 64's substantial restrictions on the ability of candidates to raise the funds necessary to run a competitive election, on the ability of political parties to help their candidates get elected, and on the ability of individual citizens to volunteer their time to campaigns show that the Act is not closely drawn to meet its objectives. In particular, five factors together lead us to this decision.

First, the record suggests, though it does not conclusively prove, that Act 64's contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns. For one thing, the petitioners' expert, Clark Bensen, conducted a race-by-race analysis of the 1998 legislative elections (the last to take place before Act 64 took effect) and concluded that Act 64's contribution limits would have reduced the funds available in 1998 to Republican challengers in competitive races in amounts ranging from 18% to 53% of their total campaign income. See 3 Tr. 52–57 (estimating loss of 47% of funds for candidate Tully, 50% for Harvey, 53% for Welch, 19% for Bahre, 29% for Delaney, 36% for LaRocque, 18% for Smith, and 31% for Brown).

For another thing, the petitioners' expert witnesses produced evidence and analysis showing that Vermont political parties (particularly the Republican Party) "target" their contributions to candidates in competitive races, that those contributions represent a significant amount of total candidate funding in such races, and that the contribution limits will cut the parties' contributions to competitive races dramatically. See 1 *id.*, at 189–190; 3 *id.*, at 50–51; 8 *id.*, at 139; 10 *id.*, at 150; see also, *e. g.*, Gierzynski & Breaux, The Role of Parties in Legislative Campaign Financing, 15 Am. Rev. Politics 171 (1994); Thompson, Cassie, & Jewell, A Sacred Cow or Just a Lot of Bull? Party and PAC Money in State Legislative Elections, 47 Pol. Research Q. 223 (1994). Their statistics showed that the party contributions accounted for a significant percentage of the total campaign income in those races. And their studies showed that Act 64's contribution limits would cut the party contributions by between 85% (for the legislature on average) and 99% (for governor).

More specifically, Bensen pointed out that in 1998, the Republican Party made contributions to 19 Senate campaigns in amounts that averaged $2,001, which on average represented 16% of the recipient campaign's total income. 3 Tr. 84. Act 64 would reduce these contributions to $300 per campaign, an average reduction of about 85%. *Ibid.* The party contributed to 50 House campaigns in amounts averaging $787, which on average represented 28% of the recipient campaign's total income. *Id.*, at 85. Act 64 would reduce these contributions to $200 per campaign, an average reduction of 74.5%. *Ibid.* And the party contributed $40,600 to its gubernatorial candidate, an amount that accounted for about 16% of the candidate's funding. *Id.*, at 86. The Act would have reduced that contribution by 99%, to $400.

Bensen added that 57% of all 1998 Senate campaigns and 30% of all House campaigns exceeded Act 64's expenditure limits, which were enacted along with the statute's contribution limits. 7 Trial Exhs. in No. 00–9159(L) etc. (CA2), Exh.

8, p. 2351. Moreover, 27% of all Senate campaigns and 10% of all House campaigns spent more than double those limits. *Ibid.*

The respondents did not contest these figures. Rather, they presented evidence that focused, not upon *strongly contested* campaigns, but upon the funding amounts available for the *average* campaign. The respondents' expert, Anthony Gierzynski, concluded, for example, that Act 64 would have a "minimal effect on . . . candidates' ability to raise funds." App. 46. But he rested this conclusion upon his finding that "only a small proportion of" *all* contributions to *all* campaigns for state office "made during the last three elections would have been affected by the new limits." *Id.*, at 47; see also *id.*, at 51 (discussing "*average* amount of revenues lost to the limits" in legislative races (emphasis added)); *id.*, at 52–53 (discussing total number of campaigns receiving contributions over Act 64's limit). The lower courts similarly relied almost exclusively on averages in assessing Act 64's effect. See 118 F. Supp. 2d, at 470 ("Approximately 88% to 96% of the campaign contributions *to recent House races* were under $200" (emphasis added)); *id.*, at 478 ("Expert testimony revealed that over the last three election cycles the percentage *of all candidates' contributions* received over the contribution limits was less than 10%" (emphasis added)).

The respondents' evidence leaves the petitioners' evidence unrebutted in certain key respects. That is because the critical question concerns not simply the *average* effect of contribution limits on fundraising but, more importantly, the ability of a candidate running against an incumbent officeholder to mount an effective *challenge*. And information about *average* races, rather than *competitive* races, is only distantly related to that question, because competitive races are likely to be far more expensive than the average race. See, *e. g.*, N. Ornstein, T. Mann, & M. Malbin, Vital Statistics on Congress 2001–2002, pp. 89–98 (2002) (data showing that spending in competitive elections, *i. e.*, where incumbent

wins with less than 60% of vote or where incumbent loses, is far greater than in most elections, where incumbent wins with more than 60% of the vote). We concede that the record does contain some anecdotal evidence supporting the respondents' position, namely, testimony about a post-Act-64 competitive mayoral campaign in Burlington, which suggests that a challenger can "amas[s] the resources necessary for effective advocacy," *Buckley*, 424 U. S., at 21. But the facts of that particular election are not described in sufficient detail to offer a convincing refutation of the implication arising from the petitioners' experts' studies.

Rather, the petitioners' studies, taken together with low *average* Vermont campaign expenditures and the typically higher costs that a challenger must bear to overcome the name-recognition advantage enjoyed by an incumbent, raise a reasonable inference that the contribution limits are so low that they may pose a significant obstacle to candidates in competitive elections. Cf. Ornstein, *supra*, at 87–96 (In the 2000 U. S. House and Senate elections, successful challengers spent far more than the average candidate). Information about average races does not rebut that inference. Consequently, the inference amounts to one factor (among others) that here counts against the constitutional validity of the contribution limits.

Second, Act 64's insistence that political parties abide by *exactly* the same low contribution limits that apply to other contributors threatens harm to a particularly important political right, the right to associate in a political party. See, *e. g.*, *California Democratic Party* v. *Jones*, 530 U. S. 567, 574 (2000) (describing constitutional importance of associating in political parties to elect candidates); *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351, 357 (1997) (same); *Colorado I*, 518 U. S., at 616 (same); *Norman* v. *Reed*, 502 U. S. 279, 288 (1992) (same). Cf. *Buckley*, *supra*, at 20–22 (contribution limits constitute "only a marginal restriction" on First Amendment rights *because* contributor remains free to asso-

ciate politically, *e. g.*, in a political party, and "assist personally" in the party's "efforts on behalf of candidates").

The Act applies its $200 to $400 limits—precisely the same limits it applies to an individual—to virtually all affiliates of a political party taken together as if they were a single contributor. Vt. Stat. Ann., Tit. 17, § 2805(a) (2002). That means, for example, that the Vermont Democratic Party, taken together with all its local affiliates, can make one contribution of at most $400 to the Democratic gubernatorial candidate, one contribution of at most $300 to a Democratic candidate for State Senate, and one contribution of at most $200 to a Democratic candidate for the State House of Representatives. The Act includes within these limits not only direct monetary contributions but also expenditures in kind: stamps, stationery, coffee, doughnuts, gasoline, campaign buttons, and so forth. See § 2801(2). Indeed, it includes all party expenditures "intended to promote the election of a specific candidate or group of candidates" as long as the candidate's campaign "facilitate[s]," "solicit[s]," or "approve[s]" them. §§ 2809(a), (c). And a party expenditure that "primarily benefits six or fewer candidates who are associated with the" party is "presumed" to count against the party's contribution limits. § 2809(d).

In addition to the negative effect on "amassing funds" that we have described, see *supra*, at 253–256, the Act would severely limit the ability of a party to assist its candidates' campaigns by engaging in coordinated spending on advertising, candidate events, voter lists, mass mailings, even yard signs. And, to an unusual degree, it would discourage those who wish to contribute small amounts of money to a party, amounts that easily comply with individual contribution limits. Suppose that many individuals do not know Vermont legislative candidates personally, but wish to contribute, say, $20 or $40, to the State Republican Party, with the intent that the party use the money to help elect whichever candidates the party believes would best advance its ideals and

interests—the basic object of a political party. Or, to take a more extreme example, imagine that 6,000 Vermont citizens each want to give $1 to the State Democratic Party because, though unfamiliar with the details of the individual races, they would like to make a small financial contribution to the goal of electing a Democratic state legislature. And further imagine that the party believes control of the legislature will depend on the outcome of three (and only three) House races. The Act prohibits the party from giving $2,000 (of the $6,000) to each of its candidates in those pivotal races. Indeed, it permits the party to give no more than $200 to each candidate, thereby thwarting the aims of the 6,000 donors from making a meaningful contribution to state politics by giving a small amount of money to the party they support. Thus, the Act would severely inhibit collective political activity by preventing a political party from using contributions by small donors to provide meaningful assistance to any individual candidate. See *supra*, at 256–257.

We recognize that we have previously upheld limits on contributions from political parties to candidates, in particular the federal limits on coordinated party spending. *Colorado II*, 533 U. S. 431. And we also recognize that any such limit will negatively affect *to some extent* the fund-allocating party function just described. But the contribution limits at issue in *Colorado II* were far less problematic, for they were significantly higher than Act 64's limits. See *id.*, at 438–439, and n. 3, 442, n. 7 (at least $67,560 in coordinated spending and $5,000 in direct cash contributions for U. S. Senate candidates, at least $33,780 in coordinated spending and $5,000 in direct cash contributions for U. S. House candidates). And they were much higher than the federal limits on contributions from individuals to candidates, thereby reflecting an effort by Congress to balance (1) the need to allow individuals to participate in the political process by contributing to political parties that help elect candidates with

(2) the need to prevent the use of political parties "to circumvent contribution limits that apply to individuals." *Id.*, at 453. Act 64, by placing identical limits upon contributions to candidates, whether made by an individual or by a political party, gives to the former consideration *no weight at all.*

We consequently agree with the District Court that the Act's contribution limits "would reduce the voice of political parties" in Vermont to a "whisper." 118 F. Supp. 2d, at 487. And we count the special party-related harms that Act 64 threatens as a further factor weighing against the constitutional validity of the contribution limits.

Third, the Act's treatment of volunteer services aggravates the problem. Like its federal statutory counterpart, the Act excludes from its definition of "contribution" all "services provided without compensation by individuals volunteering their time on behalf of a candidate." Vt. Stat. Ann., Tit. 17, §2801(2) (2002). Cf. 2 U. S. C. §431(8)(B)(i) (2000 ed. and Supp. III) (similar exemption in federal campaign finance statute). But the Act does not exclude the expenses those volunteers incur, such as travel expenses, in the course of campaign activities. The Act's broad definitions would seem to count those expenses against the volunteer's contribution limit, at least where the spending was facilitated or approved by campaign officials. Vt. Stat. Ann., Tit. 17, §2801(3) (2002) ("[E]xpenditure" includes "anything of value, paid . . . for the purpose of influencing an election"); §§2809(a), (c) (Any "expenditure . . . intentionally facilitated by, solicited by or approved by the candidate" counts as a "contribution"). And, unlike the Federal Government's treatment of comparable requirements, the State has not (insofar as we are aware) created an exception excluding such expenses. Cf. 2 U. S. C. §§431(8)(B)(iv), (ix) (2000 ed. and Supp. III) (excluding from the definition of "contribution" volunteer travel expenses up to $1,000 and payment by political party for campaign materials used in connection with volunteer activities).

The absence of some such exception may matter in the present context, where contribution limits are very low. That combination, low limits and no exceptions, means that a gubernatorial campaign volunteer who makes four or five round trips driving across the State performing volunteer activities coordinated with the campaign can find that he or she is near, or has surpassed, the contribution limit. So too will a volunteer who offers a campaign the use of her house along with coffee and doughnuts for a few dozen neighbors to meet the candidate, say, two or three times during a campaign. Cf. Vt. Stat. Ann., Tit. 17, § 2809(d) (2002) (excluding expenditures for such activities only up to $100). Such supporters will have to keep careful track of all miles driven, postage supplied (500 stamps equals $200), pencils and pads used, and so forth. And any carelessness in this respect can prove costly, perhaps generating a headline, "Campaign laws violated," that works serious harm to the candidate.

These sorts of problems are unlikely to affect the constitutionality of a limit that is reasonably high. Cf. *Buckley*, 424 U. S., at 36–37 (Coordinated expenditure by a volunteer "provides material financial assistance to a candidate," and therefore "may properly be viewed as a contribution"). But Act 64's contribution limits are so low, and its definition of "contribution" so broad, that the Act may well impede a campaign's ability effectively to use volunteers, thereby making it more difficult for individuals to associate in this way. Cf. *id.*, at 22 (Federal contribution limits "leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates"). Again, the very low limits at issue help to transform differences in degree into difference in kind. And the likelihood of unjustified interference in the present context is sufficiently great that we must consider the lack of tailoring in the Act's definition of "contribution" as an added factor counting against the constitutional validity of the contribution limits before us.

Fourth, unlike the contribution limits we upheld in *Shrink*, see *supra*, at 251, Act 64's contribution limits are not adjusted for inflation. Its limits decline in real value each year. Indeed, in real dollars the Act's limits have already declined by about 20% ($200 in 2006 dollars has a real value of $160.66 in 1997 dollars). A failure to index limits means that limits which are already suspiciously low, see *supra*, at 249–253, will almost inevitably become too low over time. It means that future legislation will be necessary to stop that almost inevitable decline, and it thereby imposes the burden of preventing the decline upon incumbent legislators who may not diligently police the need for changes in limit levels to ensure the adequate financing of electoral challenges.

Fifth, we have found nowhere in the record any special justification that might warrant a contribution limit so low or so restrictive as to bring about the serious associational and expressive problems that we have described. Rather, the basic justifications the State has advanced in support of such limits are those present in *Buckley*. The record contains no indication that, for example, corruption (or its appearance) in Vermont is significantly more serious a matter than elsewhere. Indeed, other things being equal, one might reasonably believe that a contribution of, say, $250 (or $450) to a candidate's campaign was less likely to prove a corruptive force than the far larger contributions at issue in the other campaign finance cases we have considered. See *supra*, at 250–253.

These five sets of considerations, taken together, lead us to conclude that Act 64's contribution limits are not narrowly tailored. Rather, the Act burdens First Amendment interests by threatening to inhibit effective advocacy by those who seek election, particularly challengers; its contribution limits mute the voice of political parties; they hamper participation in campaigns through volunteer activities; and they are not indexed for inflation. Vermont does not point to a legitimate statutory objective that might justify these spe-

cial burdens. We understand that many, though not all, campaign finance regulations impose certain of these burdens to some degree. We also understand the legitimate need for constitutional leeway in respect to legislative line-drawing. But our discussion indicates why we conclude that Act 64 in this respect nonetheless goes too far. It disproportionately burdens numerous First Amendment interests, and consequently, in our view, violates the First Amendment.

We add that we do not believe it possible to sever some of the Act's contribution limit provisions from others that might remain fully operative. See *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U. S. 210, 234 (1932) ("invalid part may be dropped if what is left is fully operative as a law"); see also *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U. S. 172, 191 (1999) (severability "essentially an inquiry into legislative intent"); Vt. Stat. Ann., Tit. 1, §215 (2003) (severability principles apply to Vermont statutes). To sever provisions to avoid constitutional objection here would require us to write words into the statute (inflation indexing), or to leave gaping loopholes (no limits on party contributions), or to foresee which of many different possible ways the legislature might respond to the constitutional objections we have found. Given these difficulties, we believe the Vermont Legislature would have intended us to set aside the statute's contribution limits, leaving the legislature free to rewrite those provisions in light of the constitutional difficulties we have identified.

IV

We conclude that Act 64's expenditure limits violate the First Amendment as interpreted in *Buckley* v. *Valeo*. We also conclude that the specific details of Act 64's contribution limits require us to hold that those limits violate the First Amendment, for they burden First Amendment interests in a manner that is disproportionate to the public purposes they were enacted to advance. Given our holding, we need not,

and do not, examine the constitutionality of the statute's presumption that certain party expenditures are coordinated with a candidate. Vt. Stat. Ann., Tit. 17, §2809(d) (2002). Accordingly, the judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings.

It is so ordered.

JUSTICE ALITO, concurring in part and concurring in the judgment.

I concur in the judgment and join in JUSTICE BREYER's opinion except for Parts II–B–1 and II–B–2. Contrary to the suggestion of those sections, respondents' primary defense of Vermont's expenditure limits is that those limits are consistent with *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*. See Brief for Respondent/Cross-Petitioner William H. Sorrell et al. 15–28 (hereinafter Sorrell Brief); Brief for Respondent/Cross-Petitioner Vermont Public Interest Research Group et al. 5–36 (hereinafter VPIRG Brief). Only as a backup argument, an afterthought almost, do respondents make a naked plea for us to "revisit *Buckley*." Sorrell Brief 28; VPIRG Brief 36. This is fairly incongruous, given that respondents' defense of Vermont's contribution limits rests squarely on *Buckley* and later decisions that built on *Buckley*, and yet respondents fail to explain why it would be appropriate to reexamine only one part of the holding in *Buckley*. More to the point, respondents fail to discuss the doctrine of *stare decisis* or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior constitutional decision. Indeed, only once in 99 pages of briefing from respondents do the words *"stare decisis"* appear, and that reference is in connection with *contribution* limits. See Sorrell Brief 31. Such an incomplete presentation is reason enough to refuse respondents' invitation to reexamine *Buckley*. See *United States* v. *International Business Machines Corp.*, 517 U. S. 843, 856 (1996).

Whether or not a case can be made for reexamining *Buckley* in whole or in part, what matters is that respondents do not do so here, and so I think it unnecessary to reach the issue.

JUSTICE KENNEDY, concurring in the judgment.

The Court decides the constitutionality of the limitations Vermont places on campaign expenditures and contributions. I agree that both limitations violate the First Amendment.

As the plurality notes, our cases hold that expenditure limitations "place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate." *Buckley* v. *Valeo*, 424 U. S. 1, 58–59 (1976) *(per curiam);* see also *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 618 (1996) (principal opinion); *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 497 (1985).

The parties neither ask the Court to overrule *Buckley* in full nor challenge the level of scrutiny that decision applies to campaign contributions. The exacting scrutiny the plurality applies to expenditure limitations, however, is appropriate. For the reasons explained in the plurality opinion, respondents' attempts to distinguish the present limitations from those we have invalidated are unavailing. The Court has upheld contribution limits that do "not come even close to passing any serious scrutiny." *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 410 (2000) (KENNEDY, J., dissenting). Those concerns aside, Vermont's contributions, as the plurality's detailed analysis indicates, are even more stifling than the ones that survived *Shrink*'s unduly lenient review.

The universe of campaign finance regulation is one this Court has in part created and in part permitted by its course of decisions. That new order may cause more problems than

it solves. On a routine, operational level the present system requires us to explain why $200 is too restrictive a limit while $1,500 is not. Our own experience gives us little basis to make these judgments, and certainly no traditional or well-established body of law exists to offer guidance. On a broader, systemic level political parties have been denied basic First Amendment rights. See, *e. g.*, *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 286–287, 313 (2003) (KENNEDY, J., concurring in judgment in part and dissenting in part). Entering to fill the void have been new entities such as political action committees, which are as much the creatures of law as of traditional forces of speech and association. Those entities can manipulate the system and attract their own elite power brokers, who operate in ways obscure to the ordinary citizen.

Viewed within the legal universe we have ratified and helped create, the result the plurality reaches is correct; given my own skepticism regarding that system and its operation, however, it seems to me appropriate to concur only in the judgment.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

Although I agree with the plurality that Vt. Stat. Ann., Tit. 17, §2801 *et seq.* (2002) (Act 64 or Act), is unconstitutional, I disagree with its rationale for striking down that statute. Invoking *stare decisis*, the plurality rejects the invitation to overrule *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*.[1] It then applies *Buckley* to invalidate the expenditure limitations and, less persuasively, the contribution limi-

[1] Although the plurality's *stare decisis* analysis is limited to *Buckley*'s treatment of expenditure limitations, its reasoning cannot be so confined, and would apply equally to *Buckley*'s standard for evaluating contribution limits. See *ante*, at 244 (noting, *inter alia*, that *Buckley* has engendered "considerable reliance" that would be "dramatically undermine[d]" by overruling it now).

tations. I continue to believe that *Buckley* provides insufficient protection to political speech, the core of the First Amendment. The illegitimacy of *Buckley* is further underscored by the continuing inability of the Court (and the plurality here) to apply *Buckley* in a coherent and principled fashion. As a result, *stare decisis* should pose no bar to overruling *Buckley* and replacing it with a standard faithful to the First Amendment. Accordingly, I concur only in the judgment.

I

I adhere to my view that this Court erred in *Buckley* when it distinguished between contribution and expenditure limits, finding the former to be a less severe infringement on First Amendment rights. See *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 410–418 (2000) *(Shrink)* (dissenting opinion); *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 465–466 (2001) *(Colorado II)* (same); *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 635–644 (1996) *(Colorado I)* (opinion concurring in judgment and dissenting in part). "[U]nlike the *Buckley* Court, I believe that contribution limits infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits." *Id.*, at 640. The *Buckley* Court distinguished contributions from expenditures based on the presence of an intermediary between a contributor and the speech eventually produced. But that reliance is misguided, given that "[e]ven in the case of a direct expenditure, there is usually some go-between that facilitates the dissemination of the spender's message." *Colorado I*, *supra*, at 638–639 (opinion of THOMAS, J.); *Shrink*, *supra*, at 413–418 (THOMAS, J., dissenting). Likewise, *Buckley*'s suggestion that contribution caps only marginally restrict speech, because "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support," 424 U. S.,

at 21, even if descriptively accurate, does not support restrictions on contributions. After all, statements of general support are as deserving of constitutional protection as those that communicate specific reasons for that support. *Colorado I*, *supra*, at 639–640 (opinion of THOMAS, J.); *Shrink*, *supra*, at 414–415, and n. 3 (THOMAS, J., dissenting). Accordingly, I would overrule *Buckley* and subject both the contribution and expenditure restrictions of Act 64 to strict scrutiny, which they would fail. See *Colorado I*, *supra*, at 640–641 (opinion of THOMAS, J.) ("I am convinced that under traditional strict scrutiny, broad prophylactic caps on both spending and giving in the political process . . . are unconstitutional"). See also *Colorado II*, *supra*, at 465–466 (THOMAS, J., dissenting).

II

The plurality opinion, far from making the case for *Buckley* as a rule of law, itself demonstrates that *Buckley*'s limited scrutiny of contribution limits is "insusceptible of principled application," and accordingly is not entitled to *stare decisis* effect. See *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 599 (1996) (SCALIA, J., dissenting). Indeed, "'when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent.'" *Vieth* v. *Jubelirer*, 541 U. S. 267, 306 (2004) (plurality opinion) (quoting *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991); internal quotation marks omitted). Today's newly minted, multifactor test, particularly when read in combination with the Court's decision in *Shrink*, *supra*, places this Court in the position of addressing the propriety of regulations of political speech based upon little more than its *impression* of the appropriate limits.

The plurality sets forth what appears to be a two-step process for evaluating the validity of contribution limits: First, determine whether there are "danger signs" in a particular case that the limits are too low; and, second, use "independent judicial judgment" to "review the record inde-

pendently and carefully with an eye toward assessing the statute's 'tailoring,' that is, toward assessing the proportionality of the restrictions." *Ante*, at 249. Neither step of this test can be reduced to a workable inquiry to be performed by States attempting to comply with this Court's jurisprudence.

As to the first step, it is entirely unclear how to determine whether limits are so low as to constitute "danger signs" that require a court to "examine the record independently and carefully." *Ante*, at 253. The plurality points to several aspects of the Act that support its conclusion that such signs are present here: (1) The limits are set per election cycle, rather than divided between primary and general elections; (2) the limits apply to contributions from political parties; (3) the limits are the lowest in the Nation; and (4) the limits are below those we have previously upheld. *Ante*, at 249–253.

The first two elements of the Act are indeed constitutionally problematic, but they have no bearing on whether the contribution limits are too low. The first substantially advantages candidates in a general election who did not face a serious primary challenge. In practice, this restriction will generally suppress more speech by challengers than by incumbents, without serving the interests the Court has recognized as compelling, *i. e.*, the prevention of corruption or the appearance thereof. Cf. B. Smith, Unfree Speech: The Folly of Campaign Finance Reform 50–51 (2001) (hereinafter Smith) (describing the ability of incumbents to amass money early, discouraging serious challengers from entering a race). The second element has no relation to these compelling interests either, given that "'[t]he very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes.'" *Colorado II*, *supra*, at 476 (THOMAS, J., dissenting) (citing *Colorado I*, *supra*, at 646 (THOMAS, J., concurring in judgment and dissenting in part)). That these provisions are unconstitutional, however, does not make the contribution limits on individuals unconstitutionally low.

We are left, then, with two reasons to scrutinize Act 64's limitations: They are lower than those of other States, and lower than those we have upheld in previous cases, *i. e.*, *Buckley* and *Shrink*. But the relative limits of other States cannot be the key factor, for such considerations are nothing more than a moving target. After all, if the Vermont Legislature simply persuaded several other States to lower their contribution limits to parallel Act 64, then the Act, which would still "significantly restrict the amount of funding available for challengers to run competitive campaigns," *ante*, at 253, would survive this aspect of the plurality's proposed test.

Nor is the relationship of these limits to those in *Buckley* and *Shrink* a critical fact. In *Shrink*, the Court specifically determined that *Buckley* did not "set a minimum constitutional threshold for contribution limits," rejecting such a contention as a "fundamental misunderstanding of what we held." 528 U. S., at 396. The plurality's current treatment of the limits in *Shrink* as a constitutional minimum, or at least as limits below which "danger signs" are present, thus cannot be reconciled with *Shrink* itself.

Having nevertheless concluded that these "danger signs" require us to scrutinize the record, the plurality embarks on an odd review of the contribution limits, combining unrelated factors to determine that, *"[t]aken together," ante*, at 253, the restrictions of Act 64 are not closely drawn to meet their objectives. Two of these factors simply cause the already stringent limitations on individual contributions to be more stringent; *i. e.*, volunteer services count toward the contribution limit, *ante*, at 259–260, and the limits do not change with inflation, so they will become even more stringent in time, *ante*, at 261.[2] While these characteristics confirm the plu-

[2] Ironically, the plurality is troubled by the fact that the absence of a provision adjusting the limits for inflation means that the real value of the limits will decline, and that "the burden of preventing the decline [lies] upon incumbent legislators who may not diligently police the need for changes in limit levels to ensure the adequate financing of electoral chal-

rality's impression that these limits are, indeed, quite low, they have nothing whatsoever to do with whether the restrictions are closely drawn to meet their objectives. The plurality would presumably uphold a limit on contributions of $1 million, even if volunteer services counted toward that limit and the limit did not change with inflation. Characterizing these facts as shifting Act 64's limits from "suspiciously low" to "too low," *ibid.*, provides no insight on how to draw this constitutional line.

The plurality next departs from the general applicability of the contribution limits entirely, and notes the substantial interference of the contribution limits with the activities of parties. Again, I do not dispute that the limitation on party contributions is unconstitutional; as I have previously noted, such limitations are unconstitutional even under *Buckley*. See *Colorado II*, 533 U. S., at 476–477 (dissenting opinion). But it is entirely unclear why the mere fact that the "suspiciously low" contribution limits *also apply to parties* should mean that those limits are in fact "too low" when they are applied to individuals. If the limits impermissibly intrude upon the associational rights of parties, then the limits are unconstitutional as applied to parties. But limits *on individuals* cannot be transformed from permissible to too low simply because they also apply to political parties.[3]

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lenges." *Ante*, at 261. It is impossible to square this wariness of incumbents' disinclination to enact future laws protecting challengers with the plurality's deference to those same incumbents when they make empirical judgments regarding "the precise restriction necessary to carry out the statute's legitimate objectives" in the first place. *Ante*, at 248.

[3]The plurality's connection of these two factors implies that it is concerned not with the impact on the speech of contributors, but solely with the speech of candidates, for whom the two facts might be connected. See *ante*, at 253. Indeed, the plurality notably omits interference with participation in campaigns through monetary contributions from the list of reasons the Act is unconstitutional. See *ante*, at 253, 261. But contributors, too, have a right to free speech. See *Colorado I*, 518 U. S. 604, 637 (1996)

We are left, then, with two arguably relevant points to transform these contribution limits from the realm of the "suspicious" to the realm of the impermissible. First, the limits affect a substantial portion of the money given to challengers. But contribution limits always disproportionately burden challengers, who often have smaller bases of support than incumbents. See Smith 66–70. In *Shrink*, the Court expressly rejected the argument that a negative impact on a challenger could render a contribution limit invalid, relying on the same sort of analysis of the "*average* effect of contribution limits on fundraising," *ante*, at 255, that the plurality today rejects. See 528 U. S., at 396 (noting that 97.62% of all contributors for state auditor made contributions of less than $2,000, and that "[e]ven if we were to assume that the contribution limits affected respondent['s] ability to wage a competitive campaign . . . a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley*"). Cf. *id.*, at 420 (THOMAS, J., dissenting) ("The Court in *Buckley* provided no basis for suppressing the speech of an individual candidate simply because other candidates (or candidates in the aggregate) may succeed in reaching the voting public. . . . [A]ny such reasoning would fly in the face of the premise of our political system—liberty vested in individual hands safeguards the functioning of our democracy"). An individual's First Amendment right is infringed whether his speech is decreased by 5% or 95%, and whether he suffers

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(THOMAS, J., concurring in judgment and dissenting in part) ("If an individual is limited in the amount of resources he can contribute to the pool, he is most certainly limited in his ability to associate for purposes of effective advocacy"). Even *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*, recognizes that contribution limits restrict the free speech of contributors, even if it understates the significance of this restriction. See *id.*, at 20–21 ("[A] limitation upon the amount that any one person or group may contribute to a candidate . . . entails only a marginal restriction upon the contributor's ability to engage in free communication").

alone or shares his violation with his fellow citizens. Certainly, the First Amendment does not authorize us to judge whether a restriction of political speech imposes a sufficiently severe disadvantage on challengers that a candidate should be able to complain. See *Shrink*, *supra*, at 427 (THOMAS, J., dissenting) ("[C]ourts have no yardstick by which to judge the proper amount and effectiveness of campaign speech").

The plurality's final justification fares no better. Arguing that Vermont offers no justification for imposing a limit lower than that imposed in any other State is simply another way of saying that the benchmark for whether a contribution limitation is constitutional is what other States have imposed. As I have noted above, *supra*, at 269, tying individuals' First Amendment rights to the presence or absence of similar laws in other States is inconsistent with the First Amendment.

The plurality recognizes that the burdens which lead it to invalidate Act 64's contribution limits are present under "many, though not all, campaign finance regulations." *Ante*, at 262. As a result, the plurality does not purport to offer any single touchstone for evaluating the constitutionality of such laws. Indeed, its discussion offers nothing resembling a rule at all. From all appearances, the plurality simply looked at these limits and said, in its "independent judicial judgment," *ante*, at 249, that they are too low. The atmospherics—whether they vary with inflation, whether they are as high as those in other States or those in *Shrink* and *Buckley*, whether they apply to volunteer activities and parties—no doubt help contribute to the plurality's sentiment. But a feeling does not amount to a workable rule of law.

This is not to say that the plurality errs in concluding that these limits are too low to satisfy even *Buckley*'s lenient standard. Indeed, it is almost impossible to imagine that any legislator would ever find his scruples overcome by a $201 donation. See *Shrink*, *supra*, at 425 (THOMAS, J., dis-

senting) ("I cannot fathom how a $251 contribution could pose a substantial risk of 'secur[ing] a political *quid pro quo*'" (quoting *Buckley*, 424 U. S., at 26)). And the statistics relied on by the plurality indeed reveal that substantial resources will be lost by candidates running campaigns under these limits. See *ante*, at 253–256. Given that these contribution limits severely impinge on the ability of candidates to run campaigns and on the ability of citizens to contribute to campaigns, and do so without any demonstrable need to avoid corruption, they cannot possibly satisfy even *Buckley*'s ambiguous level of scrutiny.

But the plurality's determination that this statute clearly lies on the *impermissible* side of the constitutional line gives no assistance in drawing this line, and it is clear that no such line can be drawn rationally. There is simply no way to calculate just how much money a person would need to receive before he would be corrupt or perceived to be corrupt (and such a calculation would undoubtedly vary by person). Likewise, there is no meaningful way of discerning just how many resources must be lost before speech is "disproportionately burden[ed]." *Ante*, at 262. *Buckley*, as the plurality has applied it, gives us license to simply strike down any limits that just *seem* to be too stringent, and to uphold the rest. The First Amendment does not grant us this authority. *Buckley* provides no consistent protection to the core of the First Amendment, and must be overruled.

* * *

For these reasons, I concur only in the judgment.

JUSTICE STEVENS, dissenting.

JUSTICE BREYER and JUSTICE SOUTER debate whether the *per curiam* decision in *Buckley* v. *Valeo*, 424 U. S. 1 (1976), forecloses any constitutional limitations on candidate expenditures. This is plainly an issue on which reasonable minds can disagree. The *Buckley* Court never explicitly ad-

dressed whether the pernicious effects of endless fundraising can serve as a compelling state interest that justifies expenditure limits, *post*, at 282 (SOUTER, J., dissenting), yet its silence, in light of the record before it, suggests that it implicitly treated this proposed interest insufficient, *ante*, at 245–246 (plurality opinion of BREYER, J.). Assuming this to be true, however, I am convinced that *Buckley*'s holding on expenditure limits is wrong, and that the time has come to overrule it.

I have not reached this conclusion lightly. As JUSTICE BREYER correctly observes, *stare decisis* is a principle of "'fundamental importance.'" *Ante*, at 243. But it is not an inexorable command, and several factors, taken together, provide special justification for revisiting the constitutionality of statutory limits on candidate expenditures.

To begin with, *Buckley*'s holding on expenditure limits itself upset a long-established practice. For the preceding 65 years, congressional races had been subject to statutory limits on both expenditures and contributions. See Act of Aug. 19, 1911, ch. 33, 37 Stat. 28; Federal Corrupt Practices Act of 1925, 43 Stat. 1073; Federal Election Campaign Finance Act of 1971, 86 Stat. 5; Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263; *United States* v. *Automobile Workers*, 352 U. S. 567, 575–576 (1957); *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 115–117 (2003). As the Court of Appeals had recognized in *Buckley* v. *Valeo*, 519 F. 2d 821, 859 (CADC 1975) (en banc) *(per curiam)*, our earlier jurisprudence provided solid support for treating these limits as permissible regulations of conduct rather than speech. *Ibid.* (discussing *Burroughs* v. *United States*, 290 U. S. 534 (1934), and *United States* v. *Harriss*, 347 U. S. 612 (1954)); see also 519 F. 2d, at 841, and n. 41, 851, and n. 68. While *Buckley*'s holding on contribution limits was consistent with this backdrop, its holding on expenditure limits "involve[d] collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience," *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940).

There are further reasons for reexamining *Buckley*'s holding on candidate expenditure limits that do not apply to its holding on candidate contribution limits. Although we have subsequently reiterated the line *Buckley* drew between these two types of limits, we have done so primarily in cases affirming the validity of contribution limits or their functional equivalents. See *McConnell*, 540 U. S., at 134–138; *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 440–442 (2001); *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 386–387 (2000); cf. *California Medical Assn.* v. *Federal Election Comm'n*, 453 U. S. 182, 194–195 (1981) (plurality opinion). In contrast, these are our first post-*Buckley* cases that raise the constitutionality of expenditure limits on the amounts that candidates for office may spend on their own campaigns.[1]

Accordingly, while we have explicitly recognized the importance of *stare decisis* in the context of *Buckley*'s holding on contribution limits, *McConnell*, 540 U. S., at 137–138, we have never before done so with regard to its rejection of expenditure limits. And *McConnell*'s recognition rested largely on an interest specific to *Buckley*'s holding on contribution limits. There, we stated that "[c]onsiderations of *stare decisis, buttressed by the respect that the Legislative and Judicial Branches owe to one another*, provide additional powerful reasons for adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided." 540 U. S., at 137–138 (emphasis added). This powerful buttress is absent from *Buckley*'s re-

[1] We have, of course, invalidated limits on independent expenditures by third persons. *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480 (1985); *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604 (1996); cf. *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238 (1986). In these cases the principal parties accepted *Buckley*'s holding on candidate expenditure limits and gave us no cause to consider how much weight to give *stare decisis*.

fusal to defer to the Legislature's judgment as to the importance of expenditure limits. Relatedly, while Congress and state legislatures have long relied on *Buckley*'s authorization of contribution limits, *Buckley*'s rejection of expenditure limits "has not induced [comparable] detrimental reliance," *Lawrence* v. *Texas*, 539 U. S. 558, 577 (2003). See also *Vieth* v. *Jubelirer*, 541 U. S. 267, 306 (2004) (plurality opinion) (noting lessened *stare decisis* concern where "it is hard to imagine how any action taken in reliance upon [the prior case] could conceivably be frustrated").

Perhaps in partial recognition of these points, Justice White refused to abandon his opposition to *Buckley*'s holding on expenditure limits. See *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 271 (1986); *Federal Election Comm'n* v. *National Conservative Political Action Comm.*, 470 U. S. 480, 507–512 (1985) (dissenting opinion). He believed *Buckley* deeply wrong on this issue because it confused "the identification of speech with its antecedents." *National Conservative Political Action Comm.*, 470 U. S., at 508. Over the course of his steadfast campaign, he converted at least one other *Buckley* participant to this position, see *National Conservative Political Action Comm.*, 470 U. S., at 518–521 (Marshall, J., dissenting), and his reasoning has since persuaded me—the nonparticipating Member of the *Buckley* Court—as well.

As Justice White recognized, it is quite wrong to equate money and speech. *Buckley*, 424 U. S., at 263 (opinion concurring in part and dissenting in part). To the contrary:

> "The burden on actual speech imposed by limitations on the spending of money is minimal and indirect. All rights of direct political expression and advocacy are retained. Even under the campaign laws as originally enacted, everyone was free to spend as much as they chose to amplify their views on general political issues, just not specific candidates. The restrictions, to the ex-

> tent they do affect speech, are viewpoint-neutral and indicate no hostility to the speech itself or its effects." *National Conservative Political Action Comm.*, 470 U. S., at 508–509 (White, J., dissenting).

Accordingly, these limits on expenditures are far more akin to time, place, and manner restrictions than to restrictions on the content of speech. Like Justice White, I would uphold them "so long as the purposes they serve are legitimate and sufficiently substantial." *Buckley*, 424 U. S., at 264.

Buckley's conclusion to the contrary relied on the following oft-quoted metaphor:

> "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.*, at 19, n. 18.

But, of course, while a car cannot run without fuel, a candidate can speak without spending money. And while a car can only travel so many miles per gallon, there is no limit on the number of speeches or interviews a candidate may give on a limited budget. Moreover, provided that this budget is above a certain threshold, a candidate can exercise due care to ensure that her message reaches all voters. Just as a driver need not use a Hummer to reach her destination, so a candidate need not flood the airways with ceaseless soundbites of trivial information in order to provide voters with reasons to support her.

Indeed, the examples of effective speech in the political arena that did not depend on any significant expenditure by the campaigner are legion. It was the content of William Jennings Bryan's comments on the "Cross of Gold"—and William McKinley's responses delivered from his front porch in Canton, Ohio—rather than any expenditure of money that appealed to their cost-free audiences. Neither Abraham Lincoln nor John F. Kennedy paid for the opportunity to engage in the debates with Stephen Douglas and Richard

Nixon that may well have determined the outcomes of Presidential elections. When the seasoned campaigners who were Members of the Congress that endorsed the expenditure limits in the Federal Election Campaign Act Amendments of 1974 concluded that a modest budget would not preclude them from effectively communicating with the electorate, they necessarily rejected the *Buckley* metaphor.

These campaigners also identified significant government interests favoring the imposition of expenditure limits. Not only do these limits serve as an important complement to corruption-reducing contribution limits, see *id.*, at 264 (opinion of White, J.), but they also "protect equal access to the political arena, [and] free candidates and their staffs from the interminable burden of fundraising." *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 649–650 (1996) (STEVENS, J., dissenting). These last two interests are particularly acute. When campaign costs are so high that only the rich have the reach to throw their hats into the ring, we fail "to protect the political process from undue influence of large aggregations of capital and to promote individual responsibility for democratic government." *Automobile Workers*, 352 U. S., at 590. States have recognized this problem,[2] but *Buckley*'s perceived ban on expenditure limits severely limits their options in dealing with it.

The interest in freeing candidates from the fundraising straitjacket is even more compelling. Without expenditure limits, fundraising devours the time and attention of political leaders, leaving them too busy to handle their public responsibilities effectively. That fact was well recognized by backers of the legislation reviewed in *Buckley*, by the Court of Appeals judges who voted to uphold the expenditure limitations in that statute, and by Justice White—who not inciden-

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[2] See Brief for State of Connecticut et al. as *Amici Curiae* 16–17 (citing Ariz. Rev. Stat. § 16–940(B)(7); Colo. Rev. Stat. § 1–45–102; Neb. Rev. Stat. § 32–1602(1); and R. I. Gen. Laws § 17–25–18).

tally had personal experience as an active participant in a Presidential campaign. Cf. 519 F. 2d, at 838 (and citations to legislative history contained therein); 424 U. S., at 265 (opinion of White, J.). The validity of their judgment has surely been confirmed by the mountains of evidence that has been accumulated in recent years concerning the time that elected officials spend raising money for future campaigns and the adverse effect of fundraising on the performance of their official duties.[3]

Additionally, there is no convincing evidence that these important interests favoring expenditure limits are fronts for incumbency protection. *Buckley*'s cursory suggestion to the contrary, *id.*, at 56–57, failed to take into account the mixed evidence before it on this issue. See 519 F. 2d, at 861, 862 (detailing how "[t]he material available to the court looks both ways"). And only by "permit[ting] States nationwide to experiment with these critically-needed reforms"—as 18 States urge us to do—will we enable further research on how expenditure limits relate to our incumbent reelection rates. See Brief for State of Connecticut et al. as *Amici Curiae* 3.[4] In the meantime, a legislative judgment that "enough is

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[3] See, *e. g.*, Alexander, Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials, 37 Loyola U. Chi. L. J. 669, 673–683 (2006); see also *post*, at 283 (SOUTER, J., dissenting).

[4] Indeed, the example of the city of Albuquerque suggests that concerns about incumbent entrenchment are unfounded. In 1974, the city set expenditure limits on municipal elections. A 2-year interlude aside, these limits applied until 2001, when they were successfully challenged by municipal candidates. *Homans* v. *Albuquerque*, 217 F. Supp. 2d 1197, 1200 (NM 2002), aff'd, 366 F. 3d 900 (CA10), cert. denied, 543 U. S. 1002 (2004). In its findings of fact, the Federal District Court determined that "[n]ationwide, eighty-eight percent (88%) of incumbent Mayors successfully sought reelection in 1999. In contrast, since 1974, the City has had a zero percent (0%) success rate for Mayors seeking reelection." 217 F. Supp. 2d, at 1200 (citation omitted). The court further concluded that the "system of unlimited spending has deleterious effects on the competitiveness of elections because it gives incumbent candidates an electoral advan-

enough" should command the greatest possible deference from judges interpreting a constitutional provision that, at best, has an indirect relationship to activity that affects the quantity—rather than the quality or the content—of repetitive speech in the marketplace of ideas.

One final point bears mention. Neither the opinions in *Buckley* nor those that form today's cacophony pay heed to how the Framers would have viewed candidate expenditure limits. This is not an unprincipled approach, as the historical context is "usually relevant but not necessarily dispositive." *Georgia* v. *Randolph*, 547 U. S. 103, 123 (2006) (STEVENS, J., concurring). This is particularly true of contexts that are so different. At the time of the framing the accepted posture of the leading candidates was one of modesty, acknowledging a willingness to serve rather than a desire to compete. Speculation about how the Framers would have legislated if they had foreseen the era of televised soundbites thus cannot provide us with definitive answers.

Nevertheless, I am firmly persuaded that the Framers would have been appalled by the impact of modern fundraising practices on the ability of elected officials to perform their public responsibilities. I think they would have viewed federal statutes limiting the amount of money that congressional candidates might spend in future elections as well within Congress' authority.[5] And they surely would

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tage." *Ibid.* While far from conclusive, this example cuts against the view that there is a slam-dunk correlation between expenditure limits and incumbent advantage. See also Brief for Center for Democracy and Election Management at American University as *Amicus Curiae* (concluding that Canada, the United Kingdom, New Zealand, and Malta—all of which have campaign expenditure limits—have more electoral competition than the United States, Jamaica, Ireland, and Australia—all of which lack such limits).

[5] See Art. I, § 4 (providing that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations"); see also § 5 (providing that "Each House may determine the Rules of its Proceedings").

not have expected judges to interfere with the enforcement of expenditure limits that merely require candidates to budget their activities without imposing any restrictions whatsoever on what they may say in their speeches, debates, and interviews.

For the foregoing reasons, I agree with JUSTICE SOUTER that it would be entirely appropriate to allow further proceedings on expenditure limits to go forward in these cases. For the reasons given in Parts II and III of his dissent, I also agree that Vermont's contribution limits and presumption of coordinated expenditures by political parties are constitutional, and so join those portions of his opinion.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, and with whom JUSTICE STEVENS joins as to Parts II and III, dissenting.

In 1997, the Legislature of Vermont passed Act 64 after a series of public hearings persuaded legislators that rehabilitating the State's political process required campaign finance reform. A majority of the Court today decides that the expenditure and contribution limits enacted are irreconcilable with the Constitution's guarantee of free speech. I would adhere to the Court of Appeals's decision to remand for further enquiry bearing on the limitations on candidates' expenditures, and I think the contribution limits satisfy controlling precedent. I respectfully dissent.

I

Rejecting Act 64's expenditure limits as directly contravening *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*, *ante*, at 242–246 (opinion of BREYER, J.), is at least premature.

We said in *Buckley* that "expenditure limitations impose far greater restraints on the freedom of speech and association than do . . . contribution limitations," 424 U. S., at 44, but the *Buckley* Court did not categorically foreclose the possibility that some spending limit might comport with the

First Amendment. Instead, *Buckley* held that the constitutionality of an expenditure limitation "turns on whether the governmental interests advanced in its support satisfy the [applicable] exacting scrutiny." *Ibid.* In applying that standard in *Buckley* itself, the Court gave no indication that it had given serious consideration to an aim that Vermont's statute now pursues: to alleviate the drain on candidates' and officials' time caused by the endless fundraising necessary to aggregate many small contributions to meet the opportunities for ever more expensive campaigning. Instead, we dwelt on rejecting the sufficiency of interests in reducing corruption, equalizing the financial resources of candidates, and capping the overall cost of political campaigns, see *id.*, at 55–57. Although Justice White went a step further in dissenting from the Court on expenditures, and made something of the interest in getting officials off the "treadmill" driven by the "obsession with fundraising," see *id.*, at 265 (opinion concurring in part and dissenting in part), this lurking issue was not treated as significant on the expenditure question in the *per curiam* opinion. Whatever the observations made to the *Buckley* Court about the effect of fundraising on candidates' time, the Court did not squarely address a time-protection interest as support for the expenditure limits, much less one buttressed by as thorough a record as we have here.*

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*In approving the public funding provisions of the subject campaign finance law, Subtitle H of the Internal Revenue Code, the *Buckley* Court appreciated that in enacting the provision Congress was legislating in part "to free candidates from the rigors of fundraising," 424 U. S., at 91; see also *id.*, at 96 ("Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions"). Recognition of the interest as to Subtitle H, a question of congressional power involving a different evidentiary burden, see *South Dakota* v. *Dole*, 483 U. S. 203, 207 (1987); see also *Buckley*, *supra*, at 90, does not imply a conclusive rejection of it as to the separate issue of expenditure limits.

Vermont's argument therefore does not ask us to overrule *Buckley;* it asks us to apply *Buckley*'s framework to determine whether its evidence here on a need to slow the fundraising treadmill suffices to support the enacted limitations. Vermont's claim is serious. Three decades of experience since *Buckley* have taught us much, and the findings made by the Vermont Legislature on the pernicious effect of the nonstop pursuit of money are significant. See, *e. g.*, Act 64, H. 28, Legislative Findings and Intent, App. 20 (hereinafter Legislative Findings) (finding that "candidates for statewide offices are spending inordinate amounts of time raising campaign funds"); *ibid.* (finding that "[r]obust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased"); see also *Landell* v. *Sorrell,* 118 F. Supp. 2d 459, 467 (Vt. 2000) (noting testimony of Sen. Shumlin before the legislature that raising funds "was one of the most distasteful things that I've had to do in public service" (internal quotation marks omitted)); *Landell* v. *Sorrell,* 382 F. 3d 91, 123 (CA2 2004) (public officials testified at trial that "elected officials spend time with donors rather than on their official duties").

The legislature's findings are surely significant enough to justify the Court of Appeals's remand to the District Court to decide whether Vermont's spending limits are the least restrictive means of accomplishing what the court unexceptionably found to be worthy objectives. See *id.*, at 124–125, 135–137. The District Court was instructed to examine a variety of outstanding issues, including alternatives considered by Vermont's Legislature and the reasons for rejecting them. See *id.*, at 136. Thus, the constitutionality of the expenditure limits was not conclusively decided by the Second Circuit, and I believe the evidentiary work that remained to be done would have raised the prospect for a sound answer to that question, whatever the answer might have been. In

stead, we are left with an unresolved question of narrow tailoring and with consequent doubt about the justifiability of the spending limits as necessary and appropriate correctives. This is not the record on which to foreclose the ability of a State to remedy the impact of the money chase on the democratic process. I would not, therefore, disturb the Court of Appeals's stated intention to remand.

II

Although I would defer judgment on the merits of the expenditure limitations, I believe the Court of Appeals correctly rejected the challenge to the contribution limits. Low though they are, one cannot say that "the contribution limitation[s are] so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 397 (2000).

The limits set by Vermont are not remarkable departures either from those previously upheld by this Court or from those lately adopted by other States. The plurality concedes that on a per-citizen measurement Vermont's limit for statewide elections "is slightly more generous," *ante*, at 251, than the one set by the Missouri statute approved by this Court in *Shrink*, *supra*. Not only do those dollar amounts get more generous the smaller the district, they are consistent with limits set by the legislatures of many other States, all of them with populations larger than Vermont's, some significantly so. See, *e. g.*, *Montana Right to Life Assn.* v. *Eddleman*, 343 F. 3d 1085, 1088 (CA9 2003) (approving $400 limit for candidates filed jointly for Governor and Lieutenant Governor, since increased to $500, see Mont. Code Ann. § 13–37–216(1)(a)(i) (2005)); *Daggett* v. *Commission on Governmental Ethics and Election Practices*, 205 F. 3d 445, 452 (CA1 2000) ($500 limit for gubernatorial candidates in

Maine); *Minnesota Citizens Concerned for Life, Inc.* v. *Kelley*, 427 F. 3d 1106, 1113 (CA8 2005) ($500 limit on contributions to legislative candidates in election years, $100 in other years); *Florida Right to Life, Inc.* v. *Mortham*, No. 6:98–770–CV.ORL–19A, 2000 WL 33733256, *3 (MD Fla., Mar. 20, 2000) ($500 limit on contributions to any state candidate). The point is not that this Court is bound by judicial sanctions of those numbers; it is that the consistency in legislative judgment tells us that Vermont is not an eccentric party of one, and that this is a case for the judicial deference that our own precedents say we owe here. See *Shrink*, *supra*, at 402 (BREYER, J., concurring) ("Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments"); see also *ante*, at 248 (plurality opinion) ("[O]rdinarily we have deferred to the legislature's determination of [matters related to the costs and nature of running for office]").

To place Vermont's contribution limits beyond the constitutional pale, therefore, is to forget not only the facts of *Shrink*, but also our self-admonition against second-guessing legislative judgments about the risk of corruption to which contribution limits have to be fitted. See *Shrink*, *supra*, at 391, and n. 5. And deference here would surely not be overly complaisant. Vermont's legislators themselves testified at length about the money that gets their special attention, see Legislative Findings, App. 20 (finding that "[s]ome candidates and elected officials, particularly when time is limited, respond and give access to contributors who make large contributions in preference to those who make small or no contributions"); 382 F. 3d, at 122 (testimony of Elizabeth Ready: "If I have only got an hour at night when I get home to return calls, I am much more likely to return [a donor's] call than I would [a non-donor's] . . . . [W]hen you only have a few minutes to talk, there are certain people that get access" (alterations in original)). The record revealed the

amount of money the public sees as suspiciously large, see 118 F. Supp. 2d, at 479–480 ("The limits set by the legislature . . . accurately reflect the level of contribution considered suspiciously large by the Vermont public. Testimony suggested that amounts greater than the contribution limits are considered large by the Vermont public"). And testimony identified the amounts high enough to pay for effective campaigning in a State where the cost of running tends to be on the low side, see *id.*, at 471 ("In the context of Vermont politics, $200, $300, and $400 donations are clearly large, as the legislature determined. Small donations are considered to be strong acts of political support in this state. William Meub testified that a contribution of $1 is meaningful because it represents a commitment by the contributor that is likely to become a vote for the candidate. Gubernatorial candidate Ruth Dwyer values the small contributions of $5 so much that she personally sends thank you notes to those donors"); *id.*, at 470–471 ("In Vermont, many politicians have run effective and winning campaigns with very little money, and some with no money at all. . . . Several candidates, campaign managers, and past and present government officials testified that they will be able to raise enough money to mount effective campaigns in the system of contribution limits established by Act 64"); *id.*, at 472 ("Spending in Vermont statewide elections is very low . . . . Vermont ranks 49th out of the 50 states in campaign spending. The majority of major party candidates for statewide office in the last three election cycles spent less than what the spending limits of Act 64 would allow. . . . In Vermont legislative races, low-cost methods such as door-to-door campaigning are standard and even expected by the voters").

Still, our cases do not say deference should be absolute. We can all imagine dollar limits that would be laughable, and per capita comparisons that would be meaningless because aggregated donations simply could not sustain effective campaigns. The plurality thinks that point has been reached in

Vermont, and in particular that the low contribution limits threaten the ability of challengers to run effective races against incumbents. Thus, the plurality's limit of deference is substantially a function of suspicion that political incumbents in the legislature set low contribution limits because their public recognition and easy access to free publicity will effectively augment their own spending power beyond anything a challenger can muster. The suspicion is, in other words, that incumbents cannot be trusted to set fair limits, because facially neutral limits do not in fact give challengers an even break. But this received suspicion is itself a proper subject of suspicion. The petitioners offered, and the plurality invokes, no evidence that the risk of a pro-incumbent advantage has been realized; in fact, the record evidence runs the other way, as the plurality concedes. See *ante*, at 256 ("[T]he record does contain some anecdotal evidence supporting the respondents' position, namely, testimony about a post-Act-64 competitive mayoral campaign in Burlington, which suggests that a challenger can 'amas[s] the resources necessary for effective advocacy,' *Buckley*, 424 U. S., at 21"). I would not discount such evidence that these low limits are fair to challengers, for the experience of the Burlington race is confirmed by recent empirical studies addressing this issue of incumbent's advantage. See, *e. g.*, Eom & Gross, Contribution Limits and Disparity in Contributions Between Gubernatorial Candidates, 59 Pol. Research Q. 99 (2006) ("Analyses of both the number of contributors and the dollar amount of contributions [to gubernatorial candidates] suggest no support for an increased bias in favor of incumbents resulting from the presence of campaign contribution limits. If anything, contribution limits can work to reduce the bias that traditionally works in favor of incumbents. Also, contribution limits do not seem to increase disparities between gubernatorial candidates in general" (emphasis deleted)); Bardwell, Money and Challenger Emergence in Gubernatorial Primaries, 55 Pol. Research Q. 653 (2002) (finding that

contribution limits favor neither incumbents nor challengers); Hogan, The Costs of Representation in State Legislatures: Explaining Variations in Campaign Spending, 81 Soc. Sci. Q. 941, 952 (2000) (finding that contribution limits reduce incumbent spending but have no effect on challenger or open-seat candidate spending). The Legislature of Vermont evidently tried to account for the realities of campaigning in Vermont, and I see no evidence of constitutional miscalculation sufficient to dispense with respect for its judgments.

III

Four issues of detail call for some attention, the first being the requirement that a volunteer's expenses count against the person's contribution limit. The plurality certainly makes out the case that accounting for these expenses will be a colossal nuisance, but there is no case here that the nuisance will noticeably limit volunteering, or that volunteers whose expenses reach the limit cannot continue with their efforts subject to charging their candidates for the excess. Granted, if the provisions for contribution limits were teetering on the edge of unconstitutionality, Act 64's treatment of volunteers' expenses might be the finger-flick that gives the fatal push, but it has no greater significance than that.

Second, the failure of the Vermont law to index its limits for inflation is even less important. This challenge is to the law as it is, not to a law that may have a different impact after future inflation if the state legislature fails to bring it up to economic date.

Third, subjecting political parties to the same contribution limits as individuals does not condemn the Vermont scheme. What we said in *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 454–455 (2001), dealing with regulation of coordinated expenditures, goes here, too. The capacity and desire of parties to make large contributions to competitive candidates with uphill

fights are shared by rich individuals, and the risk that large party contributions would be channels to evade individual limits cannot be eliminated. Nor are these reasons to support the party limits undercut by claims that the restrictions render parties impotent, for the parties are not precluded from uncoordinated spending to benefit their candidates. That said, I acknowledge the suggestions in the petitioners' briefs that such restrictions in synergy with other influences weakening party power would justify a wholesale reexamination of the situation of party organization today. But whether such a comprehensive reexamination belongs in courts or only in legislatures is not an issue presented by these cases.

Finally, there is the issue of Act 64's presumption of coordinated expenditures on the part of political parties, Vt. Stat. Ann., Tit. 17, § 2809(d) (2002). The plurality has no occasion to reach it; I do reach it, but find it insignificant. The Republican Party petitioners complain that the related expenditure provision imposes on both the candidate and the party the burden in some circumstances to prove that coordination of expenditure did not take place, thus threatening to charge against a candidate's spending limits some party expenditures that are in fact independent, with an ultimate consequence of chilling speech. See Brief for Petitioner Vermont Republican State Committee et al. 45–46. On the contrary, however, we can safely take the presumption on the representation to this Court by the Attorney General of Vermont: the law imposes not a burden of persuasion but merely one of production, leaving the presumption easily rebuttable. See Tr. of Oral Arg. 39–41 (representation that the presumption disappears once credible evidence, such as an affidavit, is offered); see also Brief for Respondent/Cross-Petitioner William H. Sorrell et al. 48 (The presumption "contributes no evidence and disappears when facts appear. In a case covered by the presumption, a political party need only present some evidence that the presumed fact is not true and

the presumption vanishes. . . . Simple testimony that the expenditure was not coordinated would suffice to defeat the presumption" (citations, internal quotation marks, and alterations omitted)). As so understood, the rebuttable presumption clearly imposes no onerous burden like the conclusive presumption in *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 619 (1996) (principal opinion), or the nearly conclusive one in *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 785–786 (1988). Requiring the party in possession of the pertinent facts to come forward with them, as easily as by executing an affidavit, does not rise to the level of a constitutionally offensive encumbrance here. Cf. *County Court of Ulster Cty.* v. *Allen*, 442 U. S. 140, 158, n. 16 (1979) ("To the extent that a presumption imposes an extremely low burden of production—*e. g.*, being satisfied by 'any' evidence—it may well be that its impact is no greater than that of a permissive inference").

IV

Because I would not pass upon the constitutionality of Vermont's expenditure limits prior to further enquiry into their fit with the problem of fundraising demands on candidates, and because I do not see the contribution limits as depressed to the level of political inaudibility, I respectfully dissent.

Syllabus

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION *v.* MURPHY ET VIR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 05–18. Argued April 19, 2006—Decided June 26, 2006

After respondents prevailed in their Individuals with Disabilities Education Act (IDEA) action to require petitioner school board to pay for their son's private school tuition, they sought fees for services rendered by an educational consultant during the proceedings, relying on an IDEA provision that permits a court to "award reasonable attorneys' fees as part of the costs" to prevailing parents, 20 U. S. C. § 1415(i)(3)(B). The District Court granted their motion in part. Affirming, the Second Circuit noted that, under *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437, and *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83, a cost- or fee-shifting provision will not be read to permit recovery of expert fees without explicit statutory authority, but concluded that a congressional Conference Committee Report relating to § 1415(i)(3)(B) and a footnote in *Casey* referencing that Report showed that the IDEA authorized such reimbursement.

Held: Section 1415(i)(3)(B) does not authorize prevailing parents to recover expert fees. Pp. 295–304.

(a) The resolution of this question is guided by the fact that Congress enacted the IDEA pursuant to the Spending Clause. While Congress has broad power to set the terms on which it disburses federal money to the States, any conditions it attaches to a State's acceptance of such funds must be set out "unambiguously." *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17. Fund recipients are bound only by those conditions that they accept "voluntarily and knowingly," *ibid.*, and States cannot knowingly accept conditions of which they are "unaware" or which they are "unable to ascertain," *ibid.* Thus, the question here is whether the IDEA furnishes clear notice regarding expert fees. Pp. 295–296.

(b) The Court begins with the IDEA's text, for if its "language is plain," the courts' function "'"is to enforce it according to its terms."'" *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U. S. 1, 6. While § 1415(i)(3)(B) provides for an award of "reasonable attorneys' fees," it does not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for the services of experts. "Costs" is a term of art that does not generally

include expert fees. The use of "costs" rather than "expenses" strongly suggests that § 1415(i)(3)(B) was not meant to be an open-ended provision making States liable for all expenses. Moreover, § 1415(i)(3)(B) says not that a court may award "costs" but that it may award attorney's fees "as part of the costs." This language simply adds reasonable attorney's fees to the list of recoverable costs set out in 28 U. S. C. § 1920, the general statute covering taxation of costs, which is strictly limited by § 1821. Thus, § 1415(i)(3)(B)'s text does not authorize an award of additional expert fees, and it certainly fails to present the clear notice required by the Spending Clause. Other IDEA provisions point strongly in the same direction. Of little significance here is a provision in the Handicapped Children's Protection Act of 1986 requiring the General Accounting Office to collect data on awards to prevailing parties in IDEA cases, but making no mention of consultants or experts or their fees. And the fact that the provision directed the GAO to compile data on the hours spent by consultants in IDEA cases does not mean that Congress intended that States compensate prevailing parties for fees billed by these consultants. Pp. 296–300.

(c) *Crawford Fitting Co.* and *Casey* strongly reinforce the conclusion that the IDEA does not unambiguously authorize prevailing parents to recover expert fees. *Crawford Fitting Co.*'s reasoning supports the conclusion that the term "costs" in § 1415(i)(3)(B), like "costs" in Federal Rule of Civil Procedure 54(d), the provision at issue there, is defined by the categories of expenses enumerated in 28 U. S. C. § 1920. This conclusion is buttressed by the principle, recognized in *Crawford Fitting Co.*, that no statute will be construed to authorize taxing witness fees as costs unless the statute "refer[s] explicitly to witness fees." 482 U. S., at 445. The conclusion that the IDEA does not authorize expert fee awards is confirmed even more dramatically by *Casey*, where the Court held that 42 U. S. C. § 1988, a fee-shifting provision with wording virtually identical to that of 20 U. S. C. § 1415(i)(3)(B), did not empower a district court to award expert fees to a prevailing party. 499 U. S., at 102. The Second Circuit misunderstood the meaning of the *Casey* footnote on which it relied. That footnote did not state that the Conference Committee Report set out the correct interpretation of § 1415(i)(3)(B) or provided the clear notice required under the Spending Clause. Its thrust was simply that "attorneys' fees," standing alone, is generally not understood as encompassing expert fees. Pp. 300–303.

(d) Respondents' additional arguments are unpersuasive. The IDEA's goals of "ensur[ing] that all children with disabilities have available to them a free appropriate public education," § 1400(d)(1)(A), and of safeguarding parents' right to challenge adverse school decisions are too general to provide much support for their reading of the IDEA. And

the IDEA's legislative history is insufficient help, where everything other than that history overwhelmingly suggests that expert fees may not be recovered. Pp. 303–304.

402 F. 3d 332, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 304. SOUTER, J., filed a dissenting opinion, *post*, p. 308. BREYER, J., filed a dissenting opinion, in which STEVENS and SOUTER, JJ., joined, *post*, p. 308.

Raymond G. Kuntz argued the cause for petitioner. With him on the briefs were *Jeffrey J. Schiro* and *Mario L. Spagnuolo.*

David B. Salmons argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Clement, Assistant Attorney General Kim, Deputy Solicitor General Garre, David K. Flynn, Dennis J. Dimsey,* and *Kent D. Talbert.*

David C. Vladeck argued the cause for respondents. With him on the brief were *Peter L. Strauss, Brian Wolfman,* and *Scott L. Nelson.**

JUSTICE ALITO delivered the opinion of the Court.

The Individuals with Disabilities Education Act (IDEA or Act) provides that a court "may award reasonable attorneys' fees as part of the costs" to parents who prevail in an action brought under the Act. 111 Stat. 92, 20 U. S. C. § 1415(i)(3)(B). We granted certiorari to decide whether this fee-shifting provision authorizes prevailing parents to

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*A brief of *amici curiae* urging reversal was filed for the National School Boards Association et al. by *Darcy L. Kriha, Julie Heuberger Yura, Patricia Whitten, Francisco M. Negrón, Jr., Naomi Gittins, Thomas Hutton,* and *Lisa Soronen.*

Briefs of *amici curiae* urging affirmance were filed for the Council of Parent Attorneys and Advocates by *Susan Jaffe Roberts;* and for the National Disability Rights Network et al. by *Drew S. Days III, Seth M. Galanter,* and *Linda A. Arnsbarger.*

recover fees for services rendered by experts in IDEA actions. We hold that it does not.

I

Respondents Pearl and Theodore Murphy filed an action under the IDEA on behalf of their son, Joseph Murphy, seeking to require petitioner Arlington Central School District Board of Education to pay for their son's private school tuition for specified school years. Respondents prevailed in the District Court, 86 F. Supp. 2d 354 (SDNY 2000), and the Court of Appeals for the Second Circuit affirmed, 297 F. 3d 195 (2002).

As prevailing parents, respondents then sought $29,350 in fees for the services of an educational consultant, Marilyn Arons, who assisted respondents throughout the IDEA proceedings. The District Court granted respondents' request in part. It held that only the value of Arons' time spent between the hearing request and the ruling in respondents' favor could properly be considered charges incurred in an "action or proceeding brought" under the Act, see 20 U. S. C. § 1415(i)(3)(B). 2003 WL 21694398, *9 (SDNY, July 22, 2003). This reduced the maximum recovery to $8,650. The District Court also held that Arons, a nonlawyer, could be compensated only for time spent on expert consulting services, not for time spent on legal representation, *id.*, at *4, but it concluded that all the relevant time could be characterized as falling within the compensable category, and thus allowed compensation for the full $8,650, *id.*, at *10.

The Court of Appeals for the Second Circuit affirmed. 402 F. 3d 332 (2005). Acknowledging that other Circuits had taken the opposite view, the Court of Appeals for the Second Circuit held that "Congress intended to and did authorize the reimbursement of expert fees in IDEA actions." *Id.*, at 336. The court began by discussing two decisions of this Court holding that expert fees could not be recovered as taxed costs under particular cost- or fee-shifting provisions.

See *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437 (1987) (interpreting Fed. Rule Civ. Proc. 54(d) and 28 U. S. C. § 1920); *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83 (1991) (interpreting 42 U. S. C. § 1988 (1988 ed.)). According to these decisions, the court noted, a cost- or fee-shifting provision will not be read to permit a prevailing party to recover expert fees without "'explicit statutory authority' indicating that Congress intended for that sort of fee-shifting." 402 F. 3d, at 336.

Ultimately, though, the court was persuaded by a statement in the Conference Committee Report relating to 20 U. S. C. § 1415(i)(3)(B) and by a footnote in *Casey* that made reference to that Report. 402 F. 3d, at 336–337 (citing H. R. Conf. Rep. No. 99–687, p. 5 (1986)). Based on these authorities, the court concluded that it was required to interpret the IDEA to authorize the award of the costs that prevailing parents incur in hiring experts. 402 F. 3d, at 336.

We granted certiorari, 546 U. S. 1085 (2006), to resolve the conflict among the Circuits with respect to whether Congress authorized the compensation of expert fees to prevailing parents in IDEA actions. Compare *Goldring* v. *District of Columbia*, 416 F. 3d 70, 73–77 (CADC 2005); *Neosho R–V School Dist.* v. *Clark ex rel. Clark*, 315 F. 3d 1022, 1031–1033 (CA8 2003); *T. D.* v. *LaGrange School Dist. No. 102*, 349 F. 3d 469, 480–482 (CA7 2003), with 402 F. 3d 332 (CA2 2005). We now reverse.

II

Our resolution of the question presented in this case is guided by the fact that Congress enacted the IDEA pursuant to the Spending Clause. U. S. Const., Art. I, § 8, cl. 1; see *Schaffer* v. *Weast*, 546 U. S. 49 (2005). Like its statutory predecessor, the IDEA provides federal funds to assist state and local agencies in educating children with disabilities "and conditions such funding upon a State's compliance with extensive goals and procedures." *Board of Ed. of Hendrick*

Hudson Central School Dist., Westchester Cty. v. *Rowley*, 458 U. S. 176, 179 (1982).

Congress has broad power to set the terms on which it disburses federal money to the States, see, *e. g.*, *South Dakota* v. *Dole*, 483 U. S. 203, 206–207 (1987), but when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out "unambiguously," see *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981); *Rowley*, *supra*, at 204, n. 26. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract," and therefore, to be bound by "federally imposed conditions," recipients of federal funds must accept them "voluntarily and knowingly." *Pennhurst*, 451 U. S., at 17. States cannot knowingly accept conditions of which they are "unaware" or which they are "unable to ascertain." *Ibid.* Thus, in the present case, we must view the IDEA from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds. We must ask whether such a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees. In other words, we must ask whether the IDEA furnishes clear notice regarding the liability at issue in this case.

III

A

In considering whether the IDEA provides clear notice, we begin with the text. We have "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992). When the statutory "language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co.* v. *Union*

Planters Bank, N. A., 530 U. S. 1, 6 (2000) (quoting *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241 (1989), in turn quoting *Caminetti* v. *United States*, 242 U. S. 470, 485 (1917); internal quotation marks omitted).

The governing provision of the IDEA, 20 U. S. C. § 1415(i)(3)(B), provides that "[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs" to the parents of "a child with a disability" who is the "prevailing party." While this provision provides for an award of "reasonable attorneys' fees," this provision does not even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts.

Respondents contend that we should interpret the term "costs" in accordance with its meaning in ordinary usage and that § 1415(i)(3)(B) should therefore be read to "authorize reimbursement of all costs parents incur in IDEA proceedings, including expert costs." Brief for Respondents 17.

This argument has multiple flaws. For one thing, as the Court of Appeals in this case acknowledged, "'costs' is a term of art that generally does not include expert fees." 402 F. 3d, at 336. The use of this term of art, rather than a term such as "expenses," strongly suggests that § 1415(i)(3)(B) was not meant to be an open-ended provision that makes participating States liable for all expenses incurred by prevailing parents in connection with an IDEA case—for example, travel and lodging expenses or lost wages due to time taken off from work. Moreover, contrary to respondents' suggestion, § 1415(i)(3)(B) does not say that a court may award "costs" to prevailing parents; rather, it says that a court may award reasonable attorney's fees "as part of the costs" to prevailing parents. This language simply adds reasonable attorney's fees incurred by prevailing parents to the list of costs that prevailing parents are otherwise entitled to recover. This list of otherwise recoverable costs

is obviously the list set out in 28 U. S. C. § 1920, the general statute governing the taxation of costs in federal court, and the recovery of witness fees under § 1920 is strictly limited by § 1821, which authorizes travel reimbursement and a $40 per diem. Thus, the text of 20 U. S. C. § 1415(i)(3)(B) does not authorize an award of any additional expert fees, and it certainly fails to provide the clear notice that is required under the Spending Clause.

Other provisions of the IDEA point strongly in the same direction. While authorizing the award of reasonable attorney's fees, the Act contains detailed provisions that are designed to ensure that such awards are indeed reasonable. See §§ 1415(i)(3)(C)–(G). The absence of any comparable provisions relating to expert fees strongly suggests that recovery of expert fees is not authorized. Moreover, the lack of any reference to expert fees in § 1415(d)(2) gives rise to a similar inference. This provision, which generally requires that parents receive "a full explanation of the procedural safeguards" available under § 1415 and refers expressly to "attorneys' fees," makes no mention of expert fees.

B

Respondents contend that their interpretation of § 1415(i)(3)(B) is supported by a provision of the Handicapped Children's Protection Act of 1986 that required the General Accounting Office (GAO) to collect certain data, § 4(b)(3), 100 Stat. 797 (hereinafter GAO study provision), but this provision is of little significance for present purposes. The GAO study provision directed the Comptroller General, acting through the GAO, to compile data on, among other things: "(A) the specific amount of attorneys' fees, costs, and expenses awarded to the prevailing party" in IDEA cases for a particular period of time, and (B) "the number of hours spent by personnel, including attorneys and consultants, involved in the action or proceeding, and expenses incurred

by the parents and the State educational agency and local educational agency." *Id.*, at 797–798.

Subparagraph (A) would provide some support for respondents' position if it directed the GAO to compile data on awards to prevailing parties of the expense of hiring consultants, but that is not what subparagraph (A) says. Subparagraph (A) makes no mention of consultants or experts or their fees.[1]

Subparagraph (B) similarly does not help respondents. Subparagraph (B), which directs the GAO to study "the number of hours spent [in IDEA cases] by personnel, including . . . consultants," says nothing about the award of fees to such consultants. Just because Congress directed the GAO to compile statistics on the hours spent by consultants in IDEA cases, it does not follow that Congress meant for States to compensate prevailing parties for the fees billed by these consultants.

Respondents maintain that "Congress' direction to the GAO would be inexplicable if Congress did not anticipate that the expenses for 'consultants' would be recoverable,"

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[1] Because subparagraph (A) refers to both "costs" and "expenses" awarded to prevailing parties and because it is generally presumed that statutory language is not superfluous, it could be argued that this provision manifests the expectation that prevailing parties would be awarded certain "expenses" not included in the list of "costs" set out in 28 U. S. C. § 1920 and that expert fees were intended to be among these unenumerated "expenses." This argument fails because, whatever expectation this language might seem to evidence, the fact remains that neither 20 U. S. C. § 1415 nor any other provision of the IDEA authorizes the award of any "expenses" other than "costs." Recognizing this, respondents argue not that they are entitled to recover "expenses" that are not "costs," but that expert fees *are* recoverable "costs." As a result, the reference to awards of both "expenses" and "costs" does not support respondents' position. The reference to "expenses" may relate to IDEA actions brought in state court, § 1415(i)(2)(A), where "expenses" other than "costs" might be receivable. Or the reference may be surplusage. While it is generally presumed that statutes do not contain surplusage, instances of surplusage are not unknown.

Brief for Respondents 19, but this is incorrect. There are many reasons why Congress might have wanted the GAO to gather data on expenses that were not to be taxed as costs. Knowing the costs incurred by IDEA litigants might be useful in considering future procedural amendments (which might affect these costs) or a future amendment regarding fee shifting. And, in fact, it is apparent that the GAO study provision covered expenses that could not be taxed as costs. For example, the GAO was instructed to compile statistics on the hours spent by all attorneys involved in an IDEA action or proceeding, even though the Act did not provide for the recovery of attorney's fees by a prevailing state or local educational agency.[2] Similarly, the GAO was directed to compile data on "expenses incurred by the parents," not just those parents who prevail and are thus eligible to recover taxed costs.

In sum, the terms of the IDEA overwhelmingly support the conclusion that prevailing parents may not recover the costs of experts or consultants. Certainly the terms of the IDEA fail to provide the clear notice that would be needed to attach such a condition to a State's receipt of IDEA funds.

IV

Thus far, we have considered only the text of the IDEA, but perhaps the strongest support for our interpretation of the IDEA is supplied by our decisions and reasoning in *Crawford Fitting*, 482 U. S. 437, and *Casey*, 499 U. S. 83. In light of those decisions, we do not see how it can be said

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[2] In 2000, the attorney's fees provision provided only an award to prevailing parents. See 20 U. S. C. § 1415(i)(3)(B). In 2004, Congress amended § 1415(i)(3)(B) to include two additional awards. See § 101, 118 Stat. 2724. The amendments provided awards "to a prevailing party who is a State educational agency or local educational agency" where the complaint filed is frivolous or presented for an improper purpose, such as to harass, delay, or increase the cost of litigation. See 20 U. S. C. §§ 1415(i)(3)(B)(i)(II)–(III) (2000 ed., Supp. V).

that the IDEA gives a State unambiguous notice regarding liability for expert fees.

In *Crawford Fitting*, the Court rejected an argument very similar to respondents' argument that the term "costs" in § 1415(i)(3)(B) should be construed as an open-ended reference to prevailing parents' expenses. It was argued in *Crawford Fitting* that Federal Rule of Civil Procedure 54(d), which provides for the award of "costs" to a prevailing party, authorizes the award of costs not listed in 28 U. S. C. § 1821. 482 U. S., at 439. The Court held, however, that Rule 54(d) does not give a district judge "discretion to tax whatever costs may seem appropriate"; rather, the term "costs" in Rule 54(d) is defined by the list set out in § 1920. *Id.*, at 441. Because the recovery of witness fees, see § 1920(3), is strictly limited by § 1821, the Court observed, a broader interpretation of Rule 54(d) would mean that the Rule implicitly effected a partial repeal of those provisions. *Id.*, at 442. But, the Court warned, "[w]e will not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or any other provision not referring explicitly to witness fees." *Id.*, at 445.

The reasoning of *Crawford Fitting* strongly supports the conclusion that the term "costs" in 20 U. S. C. § 1415(i)(3)(B), like the same term in Rule 54(d), is defined by the categories of expenses enumerated in 28 U. S. C. § 1920. This conclusion is buttressed by the principle, recognized in *Crawford Fitting*, that no statute will be construed as authorizing the taxation of witness fees as costs unless the statute "refer[s] explicitly to witness fees." 482 U. S., at 445; see also *ibid.* ("[A]bsent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U. S. C. § 1821 and § 1920").

Our decision in *Casey* confirms even more dramatically that the IDEA does not authorize an award of expert fees. In *Casey*, as noted above, we interpreted a fee-shifting pro-

vision, 42 U. S. C. § 1988, the relevant wording of which was virtually identical to the wording of 20 U. S. C. § 1415(i)(3)(B). Compare *ibid.* (authorizing the award of "reasonable attorneys' fees as part of the costs" to prevailing parents) with 42 U. S. C. § 1988 (1988 ed.) (permitting prevailing parties in certain civil rights actions to be awarded "a reasonable attorney's fee as part of the costs"). We held that § 1988 did not empower a district court to award expert fees to a prevailing party. *Casey, supra,* at 102. To decide in favor of respondents here, we would have to interpret the virtually identical language in 20 U. S. C. § 1415 as having exactly the opposite meaning. Indeed, we would have to go further and hold that the relevant language in the IDEA *unambiguously means* exactly the opposite of what the nearly identical language in 42 U. S. C. § 1988 was held to mean in *Casey.*

The Court of Appeals, as noted above, was heavily influenced by a *Casey* footnote, see 402 F. 3d, at 336–337 (quoting 499 U. S., at 91–92, n. 5), but the court misunderstood the footnote's meaning. The text accompanying the footnote argued, based on an analysis of several fee-shifting statutes, that the term "attorney's fees" does not include expert fees. *Id.*, at 88–91. In the footnote, we commented on petitioners' invocation of the Conference Committee Report relating to 20 U. S. C. § 1415(i)(3)(B), which stated: "'The conferees intend[ed] that the term "attorneys' fees as part of the costs" include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case.'" 499 U. S., at 91–92, n. 5 (quoting H. R. Conf. Rep. No. 99–687, at 5; ellipsis in original). This statement, the footnote commented, was "an apparent effort to *depart* from ordinary meaning and to define a term of art." 499 U. S., at 92, n. 5. The footnote did not state that the Conference Committee Report set out the correct interpretation of § 1415(i)(3)(B), much less that the Report was sufficient, despite the lan-

guage of the statute, to provide the clear notice required under the Spending Clause. The thrust of the footnote was simply that the term "attorneys' fees," standing alone, is generally not understood as encompassing expert fees. Thus, *Crawford Fitting* and *Casey* strongly reinforce the conclusion that the IDEA does not unambiguously authorize prevailing parents to recover expert fees.

V

Respondents make several arguments that are not based on the text of the IDEA, but these arguments do not show that the IDEA provides clear notice regarding the award of expert fees.

Respondents argue that their interpretation of the IDEA furthers the Act's overarching goal of "ensur[ing] that all children with disabilities have available to them a free appropriate public education," 20 U. S. C. § 1400(d)(1)(A), as well as the goal of "safeguard[ing] the rights of parents to challenge school decisions that adversely affect their child." Brief for Respondents 20. These goals, however, are too general to provide much support for respondents' reading of the terms of the IDEA. The IDEA obviously does not seek to promote these goals at the expense of all other considerations, including fiscal considerations. Because the IDEA is not intended in all instances to further the broad goals identified by respondents at the expense of fiscal considerations, the goals cited by respondents do little to bolster their argument on the narrow question presented here.[3]

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[3] Respondents note that a GAO report stated that expert witness fees are reimbursable expenses. See Brief for Respondents 19 (citing GAO, Briefing Report to Congressional Requesters, Special Education: The Attorney Fees Provision of Public Law 99–372 (GAO/HRD–90–22BR), p. 13 (Nov. 1989)). But this passing reference in a report issued by an agency not responsible for implementing the IDEA is plainly insufficient to provide clear notice regarding the scope of the conditions attached to the receipt of IDEA funds.

Finally, respondents vigorously argue that Congress clearly intended for prevailing parents to be compensated for expert fees. They rely on the legislative history of § 1415 and in particular on the following statement in the Conference Committee Report, discussed above: "The conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case." H. R. Conf. Rep. No. 99–687, at 5.

Whatever weight this legislative history would merit in another context, it is not sufficient here. Putting the legislative history aside, we see virtually no support for respondents' position. Under these circumstances, where everything other than the legislative history overwhelmingly suggests that expert fees may not be recovered, the legislative history is simply not enough. In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds. Here, in the face of the unambiguous text of the IDEA and the reasoning in *Crawford Fitting* and *Casey*, we cannot say that the legislative history on which respondents rely is sufficient to provide the requisite fair notice.

* * *

We reverse the judgment of the Court of Appeals for the Second Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, concurring in part and concurring in the judgment.

I agree, in the main, with the Court's resolution of this case, but part ways with the Court's opinion in one respect. The Court extracts from *Pennhurst State School and Hospi-*

tal v. *Halderman*, 451 U. S. 1, 17 (1981), a "clear notice" requirement, and deems it applicable in this case because Congress enacted the Individuals with Disabilities Education Act (IDEA), as it did the legislation at issue in *Pennhurst*, pursuant to the Spending Clause. *Ante*, at 296. That extraction, in my judgment, is unwarranted. *Pennhurst*'s "clear notice" requirement should not be unmoored from its context. The Court there confronted a plea to impose "an unexpected condition for compliance—a new [programmatic] obligation for participating States." *Bell* v. *New Jersey*, 461 U. S. 773, 790, n. 17 (1983). The controversy here is lower key: It concerns not the educational programs IDEA directs school districts to provide, but "the remedies available against a noncomplying [district]." *Ibid.*; see *post*, at 316–318 (BREYER, J., dissenting).

The Court's repeated references to a Spending Clause derived "clear notice" requirement, see *ante*, at 295–296, 298, 300, 303, and n. 3, are questionable on other grounds as well. For one thing, IDEA was enacted not only pursuant to Congress' Spending Clause authority, but also pursuant to § 5 of the Fourteenth Amendment. See *Smith* v. *Robinson*, 468 U. S. 992, 1009 (1984) (IDEA's predecessor, the Education of the Handicapped Act, was "set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children."). Furthermore, no "clear notice" prop is needed in this case given the twin pillars on which the Court's judgment securely rests. First, as the Court explains, *ante*, at 297–298, the specific, attorneys'-fees-oriented, provisions of IDEA, *i. e.*, 20 U. S. C. § 1415(i)(3)(B)–(G); § 1415(d)(2)(L) (2000 ed., Supp. V), "overwhelmingly support the conclusion that prevailing parents may not recover the costs of experts or consultants," *ante*, at 300. Those provisions place controls on fees recoverable for attorneys' services, without mentioning costs parents might incur for other professional services and controls geared to those costs. Second, as the Court develops, prior

decisions closely in point "strongly suppor[t]," even "confir[m] . . . dramatically," today's holding that IDEA trains on attorneys' fees and does not authorize an award covering amounts paid or payable for the services of an educational consultant. *Ante*, at 301 (citing *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437 (1987), and *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83 (1991)).

For the contrary conclusion, JUSTICE BREYER's dissent relies dominantly on a Conference Report stating the conferees' view that the term "attorneys' fees as part of the costs" includes "expenses and fees of expert witnesses" and payments for tests necessary for the preparation of a case. H. R. Conf. Rep. No. 99–687, p. 5 (1986) (internal quotation marks omitted).[1] Including costs of consultants and tests in § 1415(i)(3)(B) would make good sense in light of IDEA's overarching goal, *i. e.*, to provide a "free appropriate public education" to children with disabilities, § 1400(d)(1)(A). See *post*, at 313–316 (BREYER, J., dissenting). But Congress did not compose § 1415(i)(3)(B)'s text,[2] as it did the texts of other

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[1] The relevant statement from the Conference Report reads in its entirety:

"The conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding, as well as traditional costs incurred in the course of litigating a case." H. R. Conf. Rep. No. 99–687, at 5.

Although the Conference Report goes on to consider other matters, including controls on attorneys' fees, nothing further is said on expert witness fees or test costs.

[2] At the time the Conference Report was submitted to the Senate and House, sponsors of the legislation did not mention anything on the floor about expert or consultant fees. They were altogether clear, however, that the purpose of the legislation was to "reverse" this Court's decision in *Smith* v. *Robinson*, 468 U. S. 992 (1984). In *Smith*, the Court held that, under the statute as then designed, prevailing parents were not entitled to attorneys' fees. See 132 Cong. Rec. 16823 (1986) (remarks of Sen. Weicker) ("In adopting this legislation, we are rejecting the reasoning of

statutes too numerous and varied to ignore, to alter the common import of the terms "attorneys' fees" and "costs" in the context of expense-allocation legislation. See, *e. g.*, 42 U. S. C. § 1988(c) (added in 1991 specifically to "include expert fees as part of the attorney's fee"); *Casey*, 499 U. S., at 88–92, and n. 4 (citing variously composed *statutes* that "explicitly shift expert . . . fees *as well as* attorney's fees"). Given the constant meaning of the formulation "attorneys' fees as part of the costs" in federal legislation, we are not at liberty to rewrite "the statutory text adopted by both Houses of Congress and submitted to the President," *id.*, at 98, to add several words Congress wisely might have included. The ball, I conclude, is properly left in Congress' court to provide, if it so elects, for consultant fees and testing expenses beyond those IDEA and its implementing regulations already authorize,[3] along with any specifications, conditions, or limitations geared to those fees and expenses Congress may deem appropriate. Cf. § 1415(i)(3)(B)–(G); § 1415(d)(2)(L) (listing only attorneys' fees, not expert or consulting fees, among the procedural safeguards about which school districts must inform parents).

In sum, although I disagree with the Court's rationale to the extent that it invokes a "clear notice" requirement tied

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the Supreme Court in Smith versus Robinson."); *id.*, at 16824 (remarks of Sen. Kerry) ("This vital legislation reverses a U. S. Supreme Court decision Smith versus Robinson[.]"); *id.*, at 17608–17609 (remarks of Rep. Bartlett) ("I support those provisions in the conference agreement that, in response to the Supreme Court decision in . . . Smith versus Robinson, authoriz[e] the awarding of reasonable attorneys' fees to parents who prevail in special education court cases."); *id.*, at 17609 (remarks of Rep. Biaggi) ("This legislation clearly supports the intent of Congress back in 1975 and corrects what I believe was a gross misinterpretation of the law. Attorneys' fees should be provided to those individuals who are being denied access to the educational system.").

[3] Under 34 CFR § 300.502(b)(1) (2005), a "parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency."

to the Spending Clause, I agree with the Court's discussion of IDEA's terms, *ante*, at 296–298, and of our decisions in *Crawford* and *Casey*, *ante*, at 300–303. Accordingly, I concur in part in the Court's opinion, and join the Court's judgment.

JUSTICE SOUTER, dissenting.

I join JUSTICE BREYER's dissent and add this word only to say outright what would otherwise be implicit, that I agree with the distinction he draws between this case and *Barnes* v. *Gorman*, 536 U. S. 181 (2002). See *post*, at 318 (citing *Barnes*, *supra*, at 191 (SOUTER, J., concurring)). Beyond that, I emphasize the importance for me of § 4 of the Handicapped Children's Protection Act of 1986, 100 Stat. 797, note following 20 U. S. C. § 1415 (1988 ed.), which mandated the study by what is now known as the Government Accountability Office. That section, of equal dignity with the fee-shifting provision enacted by the same statute, makes JUSTICE BREYER's resort to the related Conference Report the reasonable course.

JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE SOUTER join, dissenting.

The Individuals with Disabilities Education Act (IDEA or Act), 20 U. S. C. § 1400 *et seq.* (2000 ed. and Supp. V), says that a court may "award reasonable attorneys' fees as part of the costs to the parents" who are prevailing parties. § 1415(i)(3)(B). Unlike the Court, I believe that the word "costs" includes, and authorizes payment of, the costs of experts. The word "costs" does not define its own scope. Neither does the phrase "attorneys' fees as part of costs." But Members of Congress did make clear their intent by, among other things, approving a Conference Report that specified that "the term 'attorneys' fees as part of the costs' include[s] reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or

guardian's case in the action or proceeding." H. R. Conf. Rep. No. 99–687, p. 5 (1986), Appendix A, *infra*, at 326. No Senator or Representative voiced *any* opposition to this statement in the discussion preceding the vote on the Conference Report—the last vote on the bill before it was sent to the President. I can find no good reason for this Court to interpret the language of this statute as meaning the precise opposite of what Congress told us it intended.

I

There are two strong reasons for interpreting the statutory phrase to include the award of expert fees. First, that is what Congress said it intended by the phrase. Second, that interpretation furthers the IDEA's statutorily defined purposes.

A

Congress added the IDEA's cost-shifting provision when it enacted the Handicapped Children's Protection Act of 1986 (HCPA), 100 Stat. 796. Senator Lowell Weicker introduced the relevant bill in 1985. 131 Cong. Rec. 1979–1980 (1985). As introduced, it sought to overturn this Court's determination that the then-current version of the IDEA (and other civil rights statutes) did not authorize courts to award attorney's fees to prevailing parents in IDEA cases. See *Smith* v. *Robinson*, 468 U. S. 992 (1984). The bill provided that "'[i]n any action or proceeding brought under this subsection, the court, in its discretion, may award a reasonable attorney's fee as part of the costs to a parent or legal representative of a handicapped child or youth who is the prevailing party.'" 131 Cong. Rec. 1980; see S. Rep. No. 99–112, p. 2 (1985).

After hearings and debate, several Senators introduced a new bill in the Senate that would have put a cap on attorney's fees for legal services lawyers, but at the same time would have explicitly authorized the award of "a reasonable attorney's fee, reasonable witness fees, and *other reasonable*

expenses of the civil action, in addition to the costs to a parent . . . who is the prevailing party." *Id.*, at 7 (some emphasis deleted). While no Senator objected to the latter provision, some objected to the cap. See, *e. g.*, *id.*, at 17–18 (additional views of Sens. Kerry, Kennedy, Pell, Dodd, Simon, Metzenbaum, and Matsunaga) (accepting cost-shifting provision, but objecting to cap and other aspects of the bill). A bipartisan group of Senators, led by Senators Hatch and Weicker, proposed an alternative bill that authorized courts to award "'a reasonable attorney's fee in addition to the costs to a parent'" who prevailed. *Id.*, at 15–16 (additional views of Sens. Hatch, Weicker, Stafford, Dole, Pell, Matsunaga, Simon, Kerry, Kennedy, Metzenbaum, Dodd, and Grassley); 131 Cong. Rec. 21389.

Senator Weicker explained that the bill

> "will enable courts to compensate parents for *whatever reasonable costs they had to incur to fully secure what was guaranteed to them by the [Education of the Handicapped Act]*. As in other fee shifting statutes, it is our intent that such awards will include, at the discretion of the court, reasonable attorney's fees, *necessary expert witness fees, and other reasonable expenses which were necessary for parents to vindicate their claim to a free appropriate public education for their handicapped child.*" *Id.*, at 21390 (emphasis added).

Not a word of opposition to this statement (or the provision) was voiced on the Senate floor, and S. 415 passed without a recorded vote. *Id.*, at 21393.

The House version of the bill also reflected an intention to authorize recovery of expert costs. Following the House hearings, the Committee on Education and Labor produced a substitute bill that authorized courts to "'award reasonable attorneys' fees, *expenses, and costs*'" to prevailing parents. H. R. Rep. No. 99–296, pp. 1, 5 (1985) (emphasis added). The House Report stated:

> "The phrase 'expenses and costs' includes *expenses of expert witnesses; the reasonable costs of any study, report, test, or project which is found to be necessary for the preparation of the parents' or guardian's due process hearing, state administrative review or civil action;* as well as traditional costs and expenses incurred in the course of litigating a case (*e. g.*, depositions and interrogatories)." *Id.*, at 6 (emphasis added).

No one objected to this statement. By the time H. R. 1523 reached the floor, another substitute bill was introduced. 131 Cong. Rec. 31369 (1985). This new bill did not change in any respect the text of the authorization of expenses and costs. It did add a provision, however, that directed the General Accounting Office (GAO)—now known as the Government Accountability Office, see note following 31 U. S. C. § 731 (2000 ed., Supp. IV)—to study and report to Congress on the fiscal impact of the cost-shifting provision. See 131 Cong. Rec. 31369–31370. The newly substituted bill passed the House without a recorded vote. *Id.*, at 31377.

Members of the House and Senate (including all of the primary sponsors of the HCPA) then met in conference to work out certain differences. At the conclusion of those negotiations, they produced a Conference Report, which contained the text of the agreed-upon bill and a "Joint Explanatory Statement of the Committee of Conference." See H. R. Conf. Rep. No. 99–687, at 5, Appendix A, *infra*, at 325. The Conference accepted the House bill's GAO provision with "an amendment expanding the data collection requirements of the GAO study to include information regarding the amount of funds expended by local educational agencies and state educational agencies on civil actions and administrative proceedings." *Id.*, at 7, Appendix A, *infra*, at 327–328. And it accepted (with minor changes) the cost-shifting provisions provided in both the Senate and House versions. The conferees explained:

"With slightly different wording, both the Senate bill and the House amendment provide for the awarding of attorneys' fees in addition to costs.

"The Senate recedes to the House and the House recedes to the Senate with an amendment clarifying that 'the court, in its discretion, may award reasonable attorneys' fees as part of the costs . . . ' This change in wording incorporates the Supreme Court['s] *Marek* v. *Chesny*[, 473 U. S. 1 (1985),] decision.

"*The conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding, as well as traditional costs incurred in the course of litigating a case.*" *Id.*, at 5, Appendix A, *infra*, at 326 (emphasis added; citation omitted).

The Conference Report was returned to the Senate and the House. A motion was put to each to adopt the Conference Report, and both the Senate and the House agreed to the Conference Report by voice votes. See Appendix B, *infra*, at 329 (Senate); Appendix C, *infra*, at 330 (House). No objection was raised to the Conference Report's statement that the cost-shifting provision was intended to authorize expert costs. I concede that "sponsors of the legislation did not mention anything on the floor about expert or consultant fees" at the time the Conference Report was submitted. *Ante*, at 306, n. 2 (GINSBURG, J., concurring in part and concurring in judgment). But I do not believe that silence is significant in light of the fact that *every* Senator and *three of the five* Representatives who spoke on the floor had previously *signed his name* to the Conference Report—a Report that made Congress' intent clear on the first page of its explanation. See Appendix A, *infra*, at 325. And every Senator and Representative who took the floor preceding the votes voiced his strong support for the Conference Report.

132 Cong. Rec. 16823–16825 (1986) (Senate); *id.*, at 17607–17612 (House). The upshot is that Members of both Houses of Congress voted to adopt both the statutory text before us and the Conference Report that made clear that the statute's words include the expert costs here in question.

B

The Act's basic purpose further supports interpreting the provision's language to include expert costs. The IDEA guarantees a "free" and "appropriate" public education for "all" children with disabilities. 20 U. S. C. § 1400(d)(1)(A) (2000 ed., Supp. V); see also § 1401(9)(A) (defining "free appropriate public education" as one "provided at public expense," "without charge"); § 1401(29) (defining "special education" as "specially designed instruction, at *no cost* to parents, to meet the unique needs of a child with a disability" (emphasis added)).

Parents have every right to become involved in the Act's efforts to provide that education; indeed, the Act encourages their participation. § 1400(c)(5)(B) (IDEA "ensur[es] that families of [disabled] children have meaningful opportunities to participate in the education of their children at school"). It assures parents that they may question a school district's decisions about what is "appropriate" for their child. And in doing so, they may secure the help of experts. § 1415(h)(1) (parents have "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities"); see generally *Schaffer* v. *Weast*, 546 U. S. 49, 53–54 (2005) (detailing Act's procedures); *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley*, 458 U. S. 176, 205–206 (1982) (emphasizing importance of Act's procedural guarantees).

The practical significance of the Act's participatory rights and procedural protections may be seriously diminished if parents are unable to obtain reimbursement for the costs of

their experts. In IDEA cases, experts are necessary. See Kuriloff & Goldberg, Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings, 2 Harv. Negotiation L. Rev. 35, 40 (1997) (detailing findings of study showing high correlation between use of experts and success of parents in challenging school district's plan); Kuriloff, Is Justice Served by Due Process?: Affecting the Outcome of Special Education Hearings in Pennsylvania, 48 Law & Contemp. Prob. 89, 100–101, 109 (1985) (same); see also Brief for National Disability Rights Network et al. as *Amici Curiae* 6–15 (collecting sources); cf. *Schaffer, supra,* at 66–67 (GINSBURG, J., dissenting) ("[T]he vast majority of parents whose children require the benefits and protections provided in the IDEA lack knowledge about the educational resources available to their child and the sophistication to mount an effective case against a district-proposed" individualized education program (IEP) (internal quotation marks and brackets omitted)).

Experts are also expensive. See Brief for Respondents 28, n. 17 (collecting District Court decisions awarding expert costs ranging from $200 to $7,600, and noting three reported cases in which expert awards exceeded $10,000). The costs of experts may not make much of a dent in a school district's budget, as many of the experts they use in IDEA proceedings are already on the staff. Cf. *Oberti* v. *Board of Ed. Clementon School Dist.*, 995 F. 2d 1204, 1219 (CA3 1993). But to parents, the award of costs may matter enormously. Without potential reimbursement, parents may well lack the services of experts entirely. See Dept. of Education, M. Wagner et al., The Individual and Household Characteristics of Youth With Disabilities: A Report from the National Longitudinal Transition Study–2 (NLTS2), p. 3–10 (Aug. 2003) (prepared by SRI International), online at http://www.nlts2.org/reports/2003_08/nlts2_report_2003_08_complete.pdf (all Internet materials as visited June 23, 2006, and available in Clerk of Court's case file) (finding that 25% of disabled

children live in poverty and 65% live in households with incomes less than $50,000); see Dept. of Education, M. Wagner, C. Marder, J. Blackorby, & D. Cardoso, The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households 28 (Sept. 2002) (prepared by SRI International), online at http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf (finding that 36% of disabled children live in households with incomes of $25,000 or less).

In a word, the Act's statutory right to a "free" and "appropriate" education may mean little to those who must pay hundreds of dollars to obtain it. That is why this Court has previously avoided interpretations that would bring about this kind of result. See *School Comm. of Burlington* v. *Department of Ed. of Mass.*, 471 U. S. 359 (1985) (construing IDEA provision granting equitable authority to courts to include the power to order reimbursement for parents who switch their child to private schools if that decision later proves correct); *id.*, at 370 (without cost reimbursement for prevailing parents, "the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete"); *Florence County School Dist. Four* v. *Carter*, 510 U. S. 7, 13 (1993) (holding that prevailing parents are not barred from reimbursement for switching their child to a private school that does not meet the IDEA's definition of a free and appropriate education). In *Carter*, we explained: "IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free. To read the provisions of § 1401(a)(18) to bar reimbursement in the circumstances of this case would defeat this statutory purpose." *Id.*, at 13–14 (citation omitted).

To read the word "costs" as requiring successful parents to bear their own expenses for experts suffers from the same problem. Today's result will leave many parents and guardians "without an expert with the firepower to match the op-

position," *Schaffer*, 546 U. S., at 61, a far cry from the level playing field that Congress envisioned.

II

The majority makes essentially three arguments against this interpretation. It says that the statute's purpose and "legislative history is simply not enough" to overcome: (1) the fact that this is a Spending Clause case; (2) the text of the statute; and (3) our prior cases which hold that the term "costs" does not include expert costs. *Ante*, at 304. I do not find these arguments convincing.

A

At the outset the majority says that it "is guided by the fact that Congress enacted the IDEA pursuant to the Spending Clause." *Ante*, at 295. "In a Spending Clause case," the majority adds, "the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds." *Ante*, at 304. Thus, the statute's "conditions must be set out 'unambiguously.'" *Ante*, at 296 (citing *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981), and *Rowley*, 458 U. S., at 204, n. 26). And "we must ask" whether the statute "furnishes clear notice regarding the liability at issue in this case." *Ante*, at 296.

I agree that the statute on its face does not *clearly* tell the States that they must pay expert fees to prevailing parents. But I do not agree that the majority has posed the right question. For one thing, we have repeatedly examined the nature and extent of the financial burdens that the IDEA imposes without reference to the Spending Clause or any "clear-statement rule." See, *e. g.*, *Burlington*, *supra*, at 369 (private school fees); *Carter*, *supra*, at 13 (same); *Smith*, 468 U. S., at 1010–1011 (attorney's fees); *Cedar Rapids Community School Dist.* v. *Garret F.*, 526 U. S. 66, 76–79 (1999) (continuous nursing service); but see *id.*, at 83 (THOMAS, J.,

joined by KENNEDY, J., dissenting). Those cases did not ask whether the statute "furnishes clear notice" to the affirmative obligation or liability at issue.

For another thing, neither *Pennhurst* nor any other case suggests that *every spending detail* of a Spending Clause statute must be spelled out with unusual clarity. To the contrary, we have held that *Pennhurst*'s requirement that Congress "unambiguously" set out "a condition on the grant of federal money" does *not* necessarily apply to legislation setting forth *"the remedies available against a noncomplying State."* *Bell* v. *New Jersey*, 461 U. S. 773, 790, n. 17 (1983) (emphasis added) (rejecting *Pennhurst*-based argument that Elementary and Secondary Education Act of 1965 did not unambiguously provide that the Secretary could recover federal funds that are misused by a State). We have added that *Pennhurst* does not require Congress "specifically" to "identify" and "proscribe *each* condition in [Spending Clause] legislation." *Jackson* v. *Birmingham Bd. of Ed.*, 544 U. S. 167, 183 (2005) (emphasis added; internal quotation marks and brackets omitted) (rejecting argument that *Pennhurst* precluded interpreting Title IX's private cause of action to encompass retaliation); see also *Bennett* v. *Kentucky Dept. of Ed.*, 470 U. S. 656, 665–666 (1985). And we have denied any implication that "suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to *all* issues that they raise." *Barnes* v. *Gorman*, 536 U. S. 181, 188–189, n. 2 (2002) (emphasis added).

These statements and holdings are not surprising. After all, the basic objective of *Pennhurst*'s clear-statement requirement does not demand textual clarity in respect to every detail. That is because ambiguity about the precise nature of a statutory program's details—particularly where they are of a kind that States might have anticipated—is rarely relevant to the basic question: Would the States have accepted the Federal Government's funds *had they only known* the nature of the accompanying conditions? Often,

the later filling-in of details through judicial interpretation will not lead one to wonder whether funding recipients would have agreed to enter the basic program at all. Given the nature of such details, it is clear that the States would have entered the program regardless. At the same time, to view each statutory detail of a highly complex federal/state program (involving, say, transportation, schools, the environment) simply through the lens of linguistic clarity, rather than to assess its meanings in terms of basic legislative purpose, is to risk a set of judicial interpretations that can prevent the program, overall, from achieving its basic objectives or that might well reduce a program in its details to incoherence.

This case is about just such a detail. Permitting parents to recover expert fees will not lead to awards of "indeterminate magnitude, untethered to compensable harm" and consequently will not "pose a concern that recipients of federal funding could not reasonably have anticipated." *Barnes*, 536 U. S., at 190–191 (SOUTER, J., joined by O'Connor, J., concurring) (citation and internal quotation marks omitted). Unlike, say, punitive damages, an award of costs to expert parties is neither "unorthodox" nor "indeterminate," and thus does not throw into doubt whether the States would have entered into the program. *Id.*, at 188. If determinations as to whether the IDEA requires States to provide continuing nursing services, *Cedar Rapids*, *supra*, or reimbursement for private school tuition, *Burlington*, 471 U. S. 359, do not call for linguistic clarity, then the precise content of recoverable "costs" does not call for such clarity here *a fortiori*.

B

If the Court believes that the statute's language is unambiguous, I must disagree. The provision at issue says that a court "may award reasonable attorneys' fees as part of the costs" to parents who prevail in an action brought under the Act. 20 U. S. C. § 1415(i)(3)(B). The statute neither defines

the word "costs" nor points to any other source of law for a definition. And the word "costs," alone, says nothing at all about which costs fall within its scope.

Neither does the statutory phrase—"as part of the costs to the parents of a child with a disability who is the prevailing party"—taken in its entirety unambiguously foreclose an award of expert fees. I agree that, read literally, that provision does not clearly grant authority to award any costs at all. And one might read it, as the Court does, as referencing another federal statute, 28 U. S. C. § 1920, which provides that authority. See *ante*, at 297–298; see also § 1920 (federal taxation of cost statute). But such a reading is not inevitable. The provision (indeed, the entire Act) says nothing about that other statute. And one can, consistent with the language, read the provision as both embodying a general authority to award costs while also specifying the inclusion of "reasonable attorneys' fees" as part of those costs (as saying, for example, that a court "may award reasonable attorneys' fees as part of [a] costs [award]").

This latter reading, while linguistically the less natural, is legislatively the more likely. The majority's alternative reading, by cross-referencing only the federal general cost-awarding statute (which applies solely *in federal courts*), would produce a jumble of different cost definitions applicable to similar IDEA administrative and state-court proceedings in different States. See § 1920 ("A judge or clerk of *any court of the United States* may tax as costs the following . . . " (emphasis added)). This result is particularly odd, as all IDEA actions must begin in state due process hearings, where the federal cost statute clearly does not apply, and the overwhelming majority of these actions are never appealed to *any* court. See GAO, Report to the Ranking Minority Member, Committee on Health, Education, Labor and Pensions, U. S. Senate, Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts (GAO–

03–897), p. 13 (Sept. 2003), online at http://www.gao.gov/new.items/d03897.pdf (approximately 3,000 administrative hearings annually; under 10% appealed to state or federal court); see also *Moore* v. *District of Columbia*, 907 F. 2d 165, 166 (CADC 1990) (en banc) (joining other Circuits in holding that IDEA authorizes an "award of attorney fees to a parent who prevails in [IDEA] administrative proceedings"). And when parents do appeal, they can file their actions in either state or federal courts. 20 U. S. C. § 1415(i)(2)(A) (2000 ed., Supp. V).

Would Congress "obviously" have wanted the content of the word "costs" to vary from State to State, proceeding to proceeding? *Ante*, at 297–298. Why? At most, the majority's reading of the text is plausible; it is not the only possible reading.

C

The majority's most persuasive argument does not focus on either the Spending Clause or lack of statutory ambiguity. Rather, the majority says that "costs" is a term of art. In light of the law's long practice of excluding expert fees from the scope of the word "costs," along with this Court's cases interpreting the word similarly in other statutes, the "legislative history is simply not enough." *Ante*, at 304.

I am perfectly willing to assume that the majority is correct about the traditional scope of the word "costs." In two cases this Court has held that the word "costs" is limited to the list set forth in 28 U. S. C. § 1920 and does not include fees paid to experts. See *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437 (1987) (interpreting Fed. Rule Civ. Proc. 54(d)); *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83 (1991) (interpreting 42 U. S. C. § 1988 (1988 ed.)). But Congress is free to redefine terms of art. See, *e. g.*, *Casey*, 499 U. S., at 88–90 (citing examples of statutes that shift "'costs of litigation (including . . . expert witness fees)'"). And we have suggested that it might well do so through a statutory provision worded in a manner similar to

the statute here—indeed, we cited the Conference Report language here at issue. *Id.*, at 91–92, n. 5 (characterizing language as an "apparent effort to *depart* from ordinary meaning and to define a term of art" and noting that Congress made no such "effort" in respect to 42 U. S. C. § 1988).

Regardless, here the statute itself indicates that Congress did not intend to use the word "costs" as a term of art. The HCPA, which added the cost-shifting provision (in § 2) to the IDEA, also added another provision (in § 4) directing the GAO to "conduct a study of the impact of the amendments to the [IDEA] made by section 2" over a 3½-year period following the Act's effective date. § 4(a), 100 Stat. 797. To determine the fiscal impact of § 2 (the cost-shifting provision), § 4 ordered the GAO to submit a report to Congress containing, among other things, the following information:

> "Data, for a geographically representative select sample of States, indicating (A) *the specific amount of attorneys' fees, costs, and expenses awarded to the prevailing party*, in each action and proceeding under [§ 2] from the date of the enactment of this Act through fiscal year 1988, *and* the range of such *fees, costs and expenses* awarded in the actions and proceedings under such section, categorized by type of complaint and (B) for the same sample as in (A) *the number of hours spent by personnel, including attorneys and consultants*, involved in the action or proceeding, and expenses incurred by the parents and the State educational agency and local educational agency." § 4(b)(3), *id.*, at 797–798 (emphasis added).

If Congress intended the word "costs" in § 2 to authorize an award of only those costs listed in the federal cost statute, why did it use the word "expenses" in § 4(b)(3)(A) as part of the "amount . . . awarded to the prevailing party"? When used as a term of art, after all, "costs" does not cover expenses. Nor does the federal costs statute cover any ex-

penses—at least not any that Congress could have wanted the GAO to study. Cf. 28 U. S. C. § 1920 (referring only once to "expenses," and doing so solely to refer to special interpretation services provided in actions initiated by the United States).

Further, why did Congress, when asking the GAO (in the statute itself) to study the "number of hours spent by personnel," include among those personnel both attorneys *"and consultants"*? Who but experts could those consultants be? Why would Congress want the GAO to study the hours that those experts "spent," unless it thought that it would help keep track of the "costs" that the statute imposed?

Of course, one might, through speculation, find other answers to these questions. One might, for example, imagine that Congress wanted the GAO to study the expenses that payment of expert fees engendered in state-court proceedings where state, but not federal, law requires that "'expenses' other than 'costs' might be receivable." *Ante*, at 299, n. 1; but see *supra*, at 319–320. Or one might think that the word "expenses" is surplusage. *Ante*, at 299, n. 1; but see *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001) (expressing Court's "'reluctan[ce] to treat statutory terms as surplusage' in any setting," but especially when they play "so pivotal a place in the statutory scheme"). Or one might believe that Congress was interested in the hours these experts spent, but not in the fees they obtained. *Ante*, at 299. But these answers are not necessarily consistent with the purpose of the GAO study provision, a purpose revealed by the language of the provision and its position in the statute. Its placement and its reference to § 2 indicate that Congress ordered the study to help it keep track of the magnitude of the reimbursements that an earlier part of the new statute (namely, § 2) mandated. See 100 Stat. 797 (stating that purpose of GAO study was to determine the "impact" of "section 2"). And the *only* reimbursement requirement that § 2 mandates is the payment of "costs."

But why speculate about this? We *know* what Congress intended the GAO study to cover. It *told* the GAO in its Conference Report that the word "costs" included the costs of experts. And, not surprisingly, the GAO made clear that it understood precisely what Congress asked it to do. In its final report, the GAO wrote: "Parents can receive reimbursement from state or local education agencies for some or all of their attorney fees *and related expenses* if they are the prevailing party in part or all of administrative hearings or court proceedings. *Expert witness fees, cost of tests or evaluations found to be necessary during the case, and court costs for services rendered during administrative and court proceedings are examples of reimbursable expenses.*" GAO, Briefing Report to Congressional Requesters, Special Education: The Attorney Fees Provision of Public Law 99–372 (GAO/HRD–90–22BR), p. 13 (Nov. 1989) (emphasis added), online at http://archive.gao.gov/d26t7/140084.pdf. At the very least, this amounts to *some* indication that Congress intended the word "costs," not as a term of art, not as it was used in the statutes at issue in *Casey* and *Crawford Fitting*, but rather as including certain additional "expenses." If that is so, the claims of tradition, of the interpretation this Court has given other statutes, cannot be so strong as to prevent us from examining the legislative history. And that history could not be more clear about the matter: Congress intended the statutory phrase "attorneys' fees as part of the costs" to include the costs of experts. See Part I, *supra*.

III

For the reasons I have set forth, I cannot agree with the majority's conclusion. Even less can I agree with its failure to consider fully the statute's legislative history. That history makes Congress' purpose clear. And our ultimate judicial goal is to interpret language in light of the statute's purpose. Only by seeking that purpose can we avoid the substitution of judicial for legislative will. Only by reading

language in its light can we maintain the democratic link between voters, legislators, statutes, and ultimate implementation, upon which the legitimacy of our constitutional system rests.

In my view, to keep faith with that interpretive goal, we must retain all traditional interpretive tools—text, structure, history, and purpose. And, because faithful interpretation is art as well as science, we cannot, through rule or canon, rule out the use of any of these tools, automatically and in advance. Cf. *Helvering* v. *Gregory*, 69 F. 2d 809, 810–811 (CA2 1934) (L. Hand, J.).

Nothing in the Constitution forbids us to give significant weight to legislative history. By disregarding a clear statement in a legislative Report adopted without opposition in both Houses of Congress, the majority has reached a result no Member of Congress expected or overtly desired. It has adopted an interpretation that undercuts, rather than furthers, the statute's purpose, a "free" and "appropriate" public education for "all" children with disabilities. See *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 133 (2001) (STEVENS, J., joined by SOUTER, GINSBURG, and BREYER, JJ., dissenting) ("A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court's own views of how things should be, but it may also defeat the very purpose for which a provision was enacted"). And it has adopted an approach that, I fear, divorces law from life. See *Duncan*, *supra*, at 193 (BREYER, J., joined by GINSBURG, J., dissenting).

For these reasons, I respectfully dissent.

APPENDIXES TO OPINION OF BREYER, J.

A

99TH CONGRESS 2d Session | HOUSE OF REPRESENTATIVES | REPORT 99-687

HANDICAPPED CHILDREN'S PROTECTION ACT OF 1986

JULY 16, 1986.—Ordered to be printed

Mr. HAWKINS, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 415]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 415), to amend the Education of the Handicapped Act to authorize the award of reasonable attorneys' fees to certain prevailing parties, and to clarify the effect of the Education of the Handicapped Act on rights, procedures, and remedies under other laws relating to the prohibition of discrimination, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

[Text of Act omitted.]

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 415) to authorize the award of attorneys' fees to certain prevailing parties, and to clarify the effect of the Education of the Handicapped Act on rights, proce-

dures, and remedies under other laws relating to the prohibition of discrimination, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report. The differences between the Senate bill and the House amendment and the substitute agreed to in the conference, are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

1. The Senate bill provides for "a reasonable attorney's fee."

The House amendment provides for "reasonable attorneys' fees."

The Senate recedes.

2. With slightly different wording, both the Senate bill and the House amendment provide for the awarding of attorneys' fees in addition to costs.

The Senate recedes to the House and the House recedes to the Senate with an amendment clarifying that "the court, in its discretion, may award reasonable attorneys' fees as part of the costs . . ." This change in wording incorporates the Supreme Court *Marek* v. *Chesny* decision (87 L. Ed. 2d 1).

The conferees intend that the term "attorneys' fees as part of the costs" include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding, as well as traditional costs incurred in the course of litigating a case.

3. The Senate bill provides for the award of attorney's fees "to a parent or legal representative."

The House amendment provides for the award of attorneys' fees "to the parents or guardian."

The Senate recedes.

4. The Senate bill limits the amount of the fee awarded whenever a parent or legal representative is represented by a publicly funded organization which provides legal services.

The House amendment provides that fee awards shall be based on prevailing rates in the community.

The House recedes to the Senate and the Senate recedes to the House with an amendment clarifying that "fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." See, *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983); *Marek* v. *Chesny*, 87 L. Ed 2d 1 (1985); and *Blum* v. *Stenson*, 104 S. Ct. 1541 (1984). However, no such awards of attorneys' fees shall be calculated by using bonuses or multipliers. The conferees want to make it clear that the inclusion of the prohibition against calculation of fees using bonuses and multipliers is limited to cases brought only under part B of the Education of the Handicapped Act. The conferees do not intend in any way to diminish the applicability of interpretation by the U.S. Supreme Court regarding bonuses and multipliers to other statutes such as 42 U.S.C. 1988. See, *Hensley* v. *Eckerhart*, *Blum* v. *Stenson*, *Evans* v. *Jeff D.*, 106 S. Ct. 1531 (1986). In addition, several new sections would be added to clarify that under part B of the Education of the Handicapped Act,

no award of attorneys' fees and related costs subject to the provision of the act may be made for services performed subsequent to the time a written offer of settlement is made to a party (if the offer is made at least 10 days prior to the date of the action or proceeding) if the offer is not accepted within ten days and a court or administrative officer finds that the relief finally obtained by the party is not more favorable to the parent or guardian than the offer of settlement. However, attorneys' fees may be awarded to a prevailing parent or guardian who was substantially justified in rejecting the settlement offer. Furthermore, the court shall reduce accordingly the amount of attorneys' fees and related expenses otherwise allowable if they determine that:

(1) the parent or guardian, during the course of the action or proceeding unreasonably protracted the final resolution of the controversy;

(2) the amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience and reputation; or

(3) the time spent and legal services furnished were excessive considering the nature of the action or proceeding.

Finally, the preceding situations in which the court reduces the amount of fees and related expenses otherwise allowable shall not apply if the local or state educational agency is determined to have unreasonably protracted the final resolution of the action or proceeding or if a violation of section 615 of the Education of the Handicapped Act is found.

The conferees intend that this provision clarify the application of the *Marek* v. *Chesny* decision to the Handicapped Children's Protection Act. One exception is made to the applicability of the *Marek* v. *Chesny* decision. When the parent or guardian is substantially justified in rejecting the settlement offer, the *Marek* v. *Chesny* decision would not apply. Substantial justification for rejection would include relevant pending court decisions which could have an impact on the case in question.

In enumerating three conditions under which the amount of attorneys' fees would be reduced, the committee intends to protect against excessive reimbursement. The second condition is a codification of the policy for awarding fees in footnote 11 of *Blum* v. *Stenson*.

5. The House amendment, but not the Senate bill, specifies that fees, expenses, and costs awarded to the prevailing party may not be paid with the funds provided under part B of EHA. The report accompanying the Senate's bill restates existing policy that bars the payment of such fees and the costs under part B.

The House recedes. The conferees wish to emphasize that existing law bars payment of attorneys' fees with funds appropriated under B of EHA.

6. The House amendment, but not the Senate bill, provides for a GAO study of the impact of the bill authorizing the awarding of fees and costs.

The Senate recedes to the House with an amendment expanding the data collection requirements of the GAO study to include infor-

mation regarding the amount of funds expended by local educational agencies and state educational agencies on civil actions and administrative proceedings.

7. The House amendment, but not the Senate bill, sunsets the court's authority to award fees at the administrative level after a period of time specified in the legislation.

The House recedes.

8. With slightly different wording, both the Senate bill and the House amendment authorize the filing of civil actions under legal authorities other than part B of EHA so long as parents first exhaust administrative remedies available under part B of EHA to the same extent as would be required under that part.

The House recedes. It is the conferees' intent that actions brought under 42 U.S.C. 1983 are governed by this provision.

9. The House amendment, but not the Senate bill, requires public access to hearing decisions.

The House recedes. The conferees wish to emphasize that public access to hearing decisions is existing law.

10. The House amendment, but not the Senate bill, requires that the public educational agency provide parents with an opportunity to meet informally in an attempt to resolve a complaint.

The House recedes.

11. The House amendment, but not the Senate bill, includes an anti-retaliation provision.

The House recedes. It is the conferees' intent that no person may discharge, intimidate, retaliate, threaten, coerce, or otherwise take an adverse action against any person because such person has filed a complaint, testified, furnished information, assisted or participated in any manner in a meeting, hearing, review, investigation, or other activity related to the administration of, exercise of authority under, or right secured by part B of EHA. The term "person" the first time it is used means a state educational agency, local educational agency, intermediate educational unit or any official or employee thereof.

12. The House amendment, but not the Senate bill, makes retroactive its provision regarding the effect of EHA on other laws (section 3).

The House recedes.

AUGUSTUS F. HAWKINS,
MARIO BIAGGI,
PAT WILLIAMS,
CHARLES A. HAYES,
MATTHEW G. MARTINEZ,
DENNIS E. ECKART,
Managers on the Part of the House.

ORRIN HATCH,
LOWELL P. WEICKER, Jr.,
DON NICKLES,
TED KENNEDY,
JOHN F. KERRY,
Managers on the Part of the Senate.

B

Excerpts from Congressional Record
132 Cong. Rec. 16823–16825 (1986) (Senate)

HANDICAPPED CHILDREN'S PROTECTION ACT—CONFERENCE REPORT

Mr. WEICKER. Mr. President, I submit a report of the committee of conference on S. 415 and ask for its immediate consideration.

The PRESIDING OFFICER. The report will be stated.

The legislative clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 415) to amend the Education of the Handicapped Act to authorize the award of reasonable attorneys' fees to certain prevailing parties, and to clarify the effect of the Education of the Handicapped Act on rights, procedures, and remedies under other laws relating to the prohibition on discrimination, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses this report, signed by a majority of the conferees.

The PRESIDING OFFICER. Without objection, the Senate will proceed to the consideration of the conference report.

[Floor statements omitted.]

Mr. WEICKER. Mr. President, I move adoption of the conference report.

The PRESIDING OFFICER. The question is on agreeing to the conference report.

The conference report was agreed to.

Mr. WEICKER. Mr. President, I move to reconsider the vote by which the conference report was agreed to.

C

Excerpts from Congressional Record

132 Cong. Rec. 17607–17612 (House)

CONFERENCE REPORT ON S. 415, HANDICAPPED CHILDREN'S PROTECTION ACT OF 1986

Mr. WILLIAMS. Mr. Speaker, I call up the conference report on the Senate bill (S. 415) to amend the Education of the Handicapped Act to authorize the award of reasonable attorneys' fees to certain prevailing parties, and to clarify the effect of the Education of the Handicapped Act on rights, procedures, and remedies under other laws relating to the prohibition of discrimination.

The Clerk read the title of the Senate bill.

[Floor statements omitted.]

Mr. WILLIAMS. Mr. Speaker, I yield back the balance of my time, and I move the previous question on the conference report.

The previous question was ordered.

The conference report was agreed to.

Syllabus

SANCHEZ-LLAMAS *v.* OREGON

CERTIORARI TO THE SUPREME COURT OF OREGON

No. 04–10566. Argued March 29, 2006—Decided June 28, 2006*

Article 36(1)(b) of the Vienna Convention on Consular Relations provides that if a person detained by a foreign country "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of such detention, and "inform the [detainee] of his rights under this sub-paragraph." Article 36(2) specifies: "The rights referred to in paragraph 1 . . . shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso . . . that the said laws . . . must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Along with the Convention, the United States ratified the Optional Protocol Concerning the Compulsory Settlement of Disputes, which provides: "Disputes arising out of the . . . Convention shall lie within the compulsory jurisdiction of the International Court of Justice [(ICJ)]." The United States withdrew from the Protocol on March 7, 2005.

Petitioner in No. 04–10566, Moises Sanchez-Llamas, is a Mexican national. When he was arrested after an exchange of gunfire with police, officers did not inform him that he could ask to have the Mexican Consulate notified of his detention. During interrogation, he made incriminating statements regarding the shootout. Before his trial for attempted murder and other offenses, Sanchez-Llamas moved to suppress those statements on the ground, *inter alia*, that the authorities had failed to comply with Article 36. The state court denied that motion and Sanchez-Llamas was convicted and sentenced to prison, and the Oregon Court of Appeals affirmed. The State Supreme Court also affirmed, concluding that Article 36 does not create rights to consular access or notification that a detained individual can enforce in a judicial proceeding.

Petitioner in No. 05–51, Mario Bustillo, a Honduran national, was arrested and charged with murder, but police never informed him that he could request that the Honduran Consulate be notified of his detention. He was convicted and sentenced to prison, and his conviction and sentence were affirmed on appeal. He then filed a habeas petition in state

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*Together with No. 05–51, *Bustillo* v. *Johnson, Director, Virginia Department of Corrections*, on certiorari to the Supreme Court of Virginia.

court arguing, for the first time, that authorities had violated his right to consular notification under Article 36. The court dismissed that claim as procedurally barred because he had failed to raise it at trial or on appeal. The Virginia Supreme Court found no reversible error.

Held: Even assuming without deciding that the Convention creates judicially enforceable rights, suppression is not an appropriate remedy for a violation, and a State may apply its regular procedural default rules to Convention claims. Pp. 342–360.

(a) Because petitioners are not in any event entitled to relief, the Court need not resolve whether the Convention grants individuals enforceable rights, but assumes, without deciding, that Article 36 does so. Pp. 342–343.

(b) Neither the Convention itself nor this Court's precedents applying the exclusionary rule support suppression of a defendant's statements to police as a remedy for an Article 36 violation.

The Convention does not mandate suppression or any other specific remedy, but expressly leaves Article 36's implementation to domestic law: Article 36 rights must "be exercised in conformity with the laws . . . of the receiving State." Art. 36(2). Sanchez-Llamas' argument that suppression is appropriate under United States law and should be required under the Court's authority to develop remedies for the enforcement of federal law in state-court criminal proceedings is rejected. "It is beyond dispute that [this Court does] not hold a supervisory power over the [state] courts." *Dickerson* v. *United States*, 530 U. S. 428, 438. The exclusionary rule cases on which Sanchez-Llamas principally relies are inapplicable because they rest on the Court's supervisory authority over federal courts.

The Court's authority to create a judicial remedy applicable in state court must therefore lie, if anywhere, in the treaty itself. Where a treaty provides for a particular judicial remedy, courts must apply it as a requirement of federal law. Cf., *e. g.*, *United States* v. *Giordano*, 416 U. S. 505, 524–525. But where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own. Even if the "full effect" language of Article 36(2) implicitly requires a judicial remedy, as Sanchez-Llamas claims, that Article equally requires that Article 36(1) rights be exercised in conformity with domestic law. Under domestic law, the exclusionary rule is not a remedy this Court applies lightly. It has been used primarily to deter certain Fourth and Fifth Amendment violations, including, *e. g.*, unconstitutional searches and seizures, *Mapp* v. *Ohio*, 367 U. S. 643, 655–657, and confessions exacted in

violation of the right against compelled self-incrimination or due process, *Dickerson*, *supra*, at 435. In contrast, Article 36 has nothing to do with searches or interrogations and, indeed, does not guarantee defendants *any* assistance at all. It secures for foreign nationals only the right to have their consulate *informed* of their arrest or detention—not to have their consulate intervene, or to have police cease their investigation pending any such notice or intervention. Moreover, the failure to inform a defendant of his Article 36 rights is unlikely, with any frequency, to produce unreliable confessions, see *Watkins* v. *Sowders*, 449 U. S. 341, 347, or to give the police any practical advantage in obtaining incriminating evidence, see *Elkins* v. *United States*, 364 U. S. 206, 217. Suppression would also be a vastly disproportionate remedy for an Article 36 violation. The interests Sanchez-Llamas claims Article 36 advances are effectively protected by other constitutional and statutory requirements, including the right to an attorney and to protection against compelled self-incrimination. Finally, suppression is not the only means of vindicating Article 36 rights. For example, diplomatic avenues—the primary means of enforcing the Vienna Convention—remain open. Pp. 343–350.

(c) States may subject Article 36 claims to the same procedural default rules that apply generally to other federal-law claims.

This question is controlled by the Court's holding in *Breard* v. *Greene*, 523 U. S. 371, 375 *(per curiam)*, that the petitioner's failure to raise an Article 36 claim in state court prevented him from having the claim heard in a subsequent federal habeas proceeding. Bustillo's two reasons why *Breard* does not control are rejected.

First, he argues that *Breard*'s procedural default holding was unnecessary to the result because the petitioner there could not demonstrate prejudice from the default and because, in any event, the later enacted Antiterrorism and Effective Death Penalty Act of 1996 superseded any right the petitioner had under the Vienna Convention to have his claim heard on collateral review. Resolution of the procedural default question, however, was the principal reason for denying the *Breard* petitioner's claim, and the discussion of the issue occupied the bulk of the Court's reasoning. See 523 U. S., at 375–377. It is no answer to argue that the procedural default holding was unnecessary simply because the petitioner had several other ways to lose.

Second, Bustillo asserts that since *Breard*, the ICJ's *LaGrand* and *Avena* decisions have interpreted the Convention to preclude the application of procedural default rules to Article 36 claims. Although the ICJ's interpretation deserves "respectful consideration," *Breard*, *supra*, at 375, it does not compel the Court to reconsider *Breard*'s understand-

ing of the Convention. "The judicial Power of the United States" is "vested in one supreme Court . . . and . . . inferior Courts." U. S. Const., Art. III, § 1. That "Power . . . extend[s] to . . . Treaties," *id.*, § 2, and includes the duty "to say what the law is," *Marbury* v. *Madison*, 1 Cranch 137, 177. If treaties are to be given effect as federal law, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department," headed by the "one supreme Court." *Ibid.* Nothing in the ICJ's structure or purpose suggests that its interpretations were intended to be binding on U. S. courts. Even according "respectful consideration," the ICJ's interpretation cannot overcome the plain import of Article 36(2), which states that the rights it implements "shall be exercised in conformity with the laws . . . of the receiving State." In the United States, this means that the rule of procedural default—which applies even to claimed violations of our own Constitution, see *Engle* v. *Isaac*, 456 U. S. 107, 129—applies also to Vienna Convention claims. Bustillo points to nothing in the drafting history of Article 36 or in the contemporary practice of other Convention signatories that undermines this conclusion. *LaGrand*'s conclusion that applying the procedural default rule denies "full effect" to the purposes of Article 36, by preventing courts from attaching legal significance to an Article 36 violation, is inconsistent with the basic framework of an adversary system. Such a system relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication. See *Castro* v. *United States*, 540 U. S. 375, 386. Procedural default rules generally take on greater importance in an adversary system than in the sort of magistrate-directed, inquisitorial legal system characteristic of many of the other Convention signatories. Under the ICJ's reading of "full effect," Article 36 claims could trump not only procedural default rules, but any number of other rules requiring parties to present their legal claims at the appropriate time for adjudication, such as statutes of limitations and prohibitions against filing successive habeas petitions. This sweeps too broadly, for it reads the "full effect" proviso in a way that leaves little room for the clear instruction in Article 36(2) that Article 36 rights "be exercised in conformity with the laws . . . of the receiving State." A comparison with a suspect's rights under *Miranda* v. *Arizona*, 384 U. S. 436, disposes of Bustillo's "full effect" claim. Although the failure to inform defendants of their right to consular notification may prevent them from becoming aware of their Article 36 rights and asserting them at trial, precisely the same thing is true of *Miranda* rights. Nevertheless, if a defendant fails to raise his *Miranda* claim at trial, procedural default rules may bar him from raising the claim in a

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subsequent postconviction proceeding. *Wainwright* v. *Sykes*, 433 U. S. 72, 87. Bustillo's attempt to analogize an Article 36 claim to a claim under *Brady* v. *Maryland*, 373 U. S. 83, that the prosecution failed to disclose exculpatory evidence is inapt. Finally, his argument that Article 36 claims are most appropriately raised post-trial or on collateral review under *Massaro* v. *United States*, 538 U. S. 500, is rejected. See *Dickerson*, 530 U. S., at 438. Pp. 350–360.

(d) The Court's holding in no way disparages the Convention's importance. It is no slight to the Convention to deny petitioners' claims under the same principles this Court would apply to claims under an Act of Congress or the Constitution itself. P. 360.

No. 04–10566, 338 Ore. 267, 108 P. 3d 573, and No. 05–51, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment, *post*, p. 360. BREYER, J., filed a dissenting opinion, in which STEVENS and SOUTER, JJ., joined, and in which GINSBURG, J., joined as to Part II, *post*, p. 365.

Peter Gartlan argued the cause for petitioner in No. 04–10566. With him on the briefs were *Donald Francis Donovan*, *Carl Micarelli*, and *Catherine M. Amirfar*. *Mark T. Stancil* argued the cause for petitioner in No. 05–51. With him on the briefs were *Jeffrey A. Lamken* and *John C. Kiyonaga*.

Mary H. Williams, Solicitor General of Oregon, argued the cause for respondent in No. 04–10566. With her on the brief were *Hardy Myers*, Attorney General, *Peter Shepherd*, Deputy Attorney General, and *Erik Wasmann* and *Benjamin R. Hartman*, Assistant Attorneys General. *William E. Thro*, State Solicitor General of Virginia, argued the cause for respondent in No. 05–51. With him on the brief were *Robert F. McDonnell*, Attorney General, *Stephen R. McCullough*, Assistant Attorney General, *Ronald N. Regnery* and *Courtney M. Malveaux*, Associate State Solicitors General, *William C. Mims*, Chief Deputy Attorney General, and *Marla Graff Decker*, Deputy Attorney General.

Deputy Solicitor General Garre argued the cause for the United States as *amicus curiae* supporting respondents in

Counsel

both cases. On the brief were *Solicitor General Clement, Assistant Attorney General Fisher, Deputy Solicitor General Dreeben, Douglas Hallward-Driemeier,* and *Robert J. Erickson.*†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the Republic of Honduras et al. by *Paul R. Q. Wolfson* and *Asim Bhansali;* for the Association of the Bar of the City of New York by *Matthew D. Roberts;* for Bar Associations et al. by *Kevin R. Sullivan, William J. Aceves,* and *Jenny S. Martinez;* and for L. Bruce Laingen et al. by *Daniel C. Malone.*

Briefs of *amici curiae* urging reversal in No. 04–10566 were filed for the Government of the United Mexican States by *Sandra L. Babcock;* and for the National Association of Criminal Defense Lawyers et al. by *Thomas H. Speedy Rice.*

Briefs of *amici curiae* urging reversal in No. 05–51 were filed for the American Bar Association by *Michael S. Greco* and *Jeffrey L. Bleich;* and for the Mid-Atlantic Innocence Project et al. by *Seth A. Tucker.*

Briefs of *amici curiae* urging affirmance in both cases were filed for the State of Alabama et al. by *R. Ted Cruz,* Solicitor General of Texas, *Greg Abbott,* Attorney General, *Barry R. McBee,* First Assistant Attorney General, *Don Clemmer,* Deputy Attorney General, and *Kristofer S. Monson,* Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *Bill Lockyer* of California, *John W. Suthers* of Colorado, *Carl C. Danberg* of Delaware, *Charles J. Crist, Jr.,* of Florida, *Thurbert E. Baker* of Georgia, *Lawrence G. Wasden* of Idaho, *Steve Carter* of Indiana, *Tom Miller* of Iowa, *Tom Reilly* of Massachusetts, *Michael A. Cox* of Michigan, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *George J. Chanos* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Patricia A. Madrid* of New Mexico, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.,* of Pennsylvania, *Lawrence E. Long* of South Dakota, *Paul G. Summers* of Tennessee, *Mark L. Shurtleff* of Utah, *Rob McKenna* of Washington, and *Patrick J. Crank* of Wyoming; and for Professors of International Law et al. by *Paul B. Stephan, Samuel Estreicher,* and *Eugene Theroux.*

Kent S. Scheidegger filed a brief for the Criminal Justice Foundation as *amicus curiae* urging affirmance in No. 04–10566.

Briefs of *amici curiae* were filed in both cases for the European Union et al. by *S. Adele Shank* and *John B. Quigley;* for the Alliance Defense

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Article 36 of the Vienna Convention on Consular Relations (Vienna Convention or Convention), Apr. 24, 1963, [1970] 21 U. S. T. 77, 100–101, T. I. A. S. No. 6820, addresses communication between an individual and his consular officers when the individual is detained by authorities in a foreign country. These consolidated cases concern the availability of judicial relief for violations of Article 36. We are confronted with three questions. *First*, does Article 36 create rights that defendants may invoke against the detaining authorities in a criminal trial or in a postconviction proceeding? *Second*, does a violation of Article 36 require suppression of a defendant's statements to police? *Third*, may a State, in a postconviction proceeding, treat a defendant's Article 36 claim as defaulted because he failed to raise the claim at trial? We conclude, even assuming the Convention creates judicially enforceable rights, that suppression is not an appropriate remedy for a violation of Article 36, and that a State may apply its regular rules of procedural default to Article 36 claims. We therefore affirm the decisions below.

I

A

The Vienna Convention was drafted in 1963 with the purpose, evident in its preamble, of "contribut[ing] to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." 21 U. S. T., at 79. The Convention consists of 79 articles regulating various aspects of consular activities. At present, 170

Fund by *William Wagner* and *Benjamin W. Bull;* for Former United States Diplomats by *Harold Hongju Koh;* for the International Court of Justice Experts by *Lori Fisler Damrosch* and *Charles Owen Verrill, Jr.;* and for Law Professors by *John F. Stanton* and *Helen K. Michael.*

countries are party to the Convention. The United States, upon the advice and consent of the Senate, ratified the Convention in 1969. *Id.*, at 77.

Article 36 of the Convention concerns consular officers' access to their nationals detained by authorities in a foreign country. The article provides that "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner." Art. 36(1)(b), *id.*, at 101.[1] In other words, when a national of one country is detained by

[1] In its entirety, Article 36 of the Vienna Convention states:

"1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

"(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

"(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

"(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

"2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." 21 U. S. T., at 100–101.

authorities in another, the authorities must notify the consular officers of the detainee's home country if the detainee so requests. Article 36(1)(b) further states that "[t]he said authorities shall inform the person concerned [*i. e.*, the detainee] without delay of his rights under this subparagraph." *Ibid.* The Convention also provides guidance regarding how these requirements, and the other requirements of Article 36, are to be implemented:

> "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Art. 36(2), *ibid.*

Along with the Vienna Convention, the United States ratified the Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol or Protocol), Apr. 24, 1963, [1970] 21 U. S. T. 325, T. I. A. S. No. 6820. The Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice [(ICJ)]," and allows parties to the Protocol to bring such disputes before the ICJ. *Id.*, at 326. The United States gave notice of its withdrawal from the Optional Protocol on March 7, 2005. Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations.

B

Petitioner Moises Sanchez-Llamas is a Mexican national. In December 1999, he was involved in an exchange of gunfire with police in which one officer suffered a gunshot wound in the leg. Police arrested Sanchez-Llamas and gave him warnings under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), in

both English and Spanish. At no time, however, did they inform him that he could ask to have the Mexican Consulate notified of his detention.

Shortly after the arrest and *Miranda* warnings, police interrogated Sanchez-Llamas with the assistance of an interpreter. In the course of the interrogation, Sanchez-Llamas made several incriminating statements regarding the shootout with police. He was charged with attempted aggravated murder, attempted murder, and several other offenses. Before trial, Sanchez-Llamas moved to suppress the statements he made to police. He argued that suppression was warranted because the statements were made involuntarily and because the authorities had failed to comply with Article 36 of the Vienna Convention. The trial court denied the motion. The case proceeded to trial, and Sanchez-Llamas was convicted and sentenced to 20½ years in prison.

He appealed, again arguing that the Vienna Convention violation required suppression of his statements. The Oregon Court of Appeals affirmed. Judgt. order reported at 191 Ore. App. 399, 84 P. 3d 1133 (2004). The Oregon Supreme Court also affirmed, concluding that Article 36 "does not create rights to consular access or notification that are enforceable by detained individuals in a judicial proceeding." 338 Ore. 267, 276, 108 P. 3d 573, 578 (2005) (en banc). We granted certiorari. 546 U. S. 1001 (2005).

C

Petitioner Mario Bustillo, a Honduran national, was with several other men at a restaurant in Springfield, Virginia, on the night of December 10, 1997. That evening, outside the restaurant, James Merry was struck in the head with a baseball bat as he stood smoking a cigarette. He died several days later. Several witnesses at the scene identified Bustillo as the assailant. Police arrested Bustillo the morning after the attack and eventually charged him with mur-

der. Authorities never informed him that he could request to have the Honduran Consulate notified of his detention.

At trial, the defense pursued a theory that another man, known as "Sirena," was responsible for the attack. Two defense witnesses testified that Bustillo was not the killer. One of the witnesses specifically identified the attacker as Sirena. In addition, a third defense witness stated that she had seen Sirena on a flight to Honduras the day after the victim died. In its closing argument before the jury, the prosecution dismissed the defense theory about Sirena. See App. in No. 05–51, p. 21 ("This whole Sirena thing, I don't want to dwell on it too much. It's very convenient that Mr. Sirena apparently isn't available"). A jury convicted Bustillo of first-degree murder, and he was sentenced to 30 years in prison. His conviction and sentence were affirmed on appeal.

After his conviction became final, Bustillo filed a petition for a writ of habeas corpus in state court. There, for the first time, he argued that authorities had violated his right to consular notification under Article 36 of the Vienna Convention. He claimed that if he had been advised of his right to confer with the Honduran Consulate, he "would have done so without delay." App. in No. 05–51, at 60. Moreover, the Honduran Consulate executed an affidavit stating that "it would have endeavoured to help Mr. Bustillo in his defense" had it learned of his detention prior to trial. *Id.*, at 74. Bustillo insisted that the consulate could have helped him locate Sirena prior to trial. His habeas petition also argued, as part of a claim of ineffective assistance of counsel, that his attorney should have advised him of his right to notify the Honduran Consulate of his arrest and detention.[2]

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[2] Bustillo's habeas petition also presented newly acquired evidence that tended to cast doubt on his conviction. Most notably, he produced a secretly recorded videotape in which Sirena admitted killing Merry and stated that Bustillo had been wrongly convicted. App. in No. 05–51, at

The state habeas court dismissed Bustillo's Vienna Convention claim as "procedurally barred" because he had failed to raise the issue at trial or on appeal. App. to Pet. for Cert. in No. 05–51, p. 43a. The court also denied Bustillo's claim of ineffective assistance of counsel, ruling that his belated claim that counsel should have informed him of his Vienna Convention rights was barred by the applicable statute of limitations and also meritless under *Strickland* v. *Washington*, 466 U. S. 668 (1984). App. in No. 05–51, at 132. In an order refusing Bustillo's petition for appeal, the Supreme Court of Virginia found "no reversible error" in the habeas court's dismissal of the Vienna Convention claim. App. to Pet. for Cert. in No. 05–51, at 1a. We granted certiorari to consider the Vienna Convention issue. 546 U. S. 1001 (2005).

II

We granted certiorari as to three questions presented in these cases: (1) whether Article 36 of the Vienna Convention grants rights that may be invoked by individuals in a judicial proceeding; (2) whether suppression of evidence is a proper remedy for a violation of Article 36; and (3) whether an Article 36 claim may be deemed forfeited under state procedural rules because a defendant failed to raise the claim at trial.

As a predicate to their claims for relief, Sanchez-Llamas and Bustillo each argue that Article 36 grants them an individually enforceable right to request that their consular officers be notified of their detention, and an accompanying

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38, 54. In addition, Bustillo argued that the prosecution violated *Brady* v. *Maryland*, 373 U. S. 83 (1963), by failing to disclose that on the night of the crime, police had questioned a man named "Julio C. Osorto," who is now known to be the same man as "Sirena." The police report concerning the encounter stated that Sirena appeared to have ketchup on his pants. Bustillo contends that these stains might in fact have been the victim's blood. The Commonwealth disputes this. The state habeas court found "no evidence of any transfer of the victim's blood to the assailant," and concluded that the undisclosed encounter between police and Sirena was not material under *Brady*. App. in No. 05–51, at 167.

right to be informed by authorities of the availability of consular notification. Respondents and the United States, as *amicus curiae*, strongly dispute this contention. They argue that "there is a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts." Brief for United States 11; *ibid.* (quoting *Head Money Cases*, 112 U. S. 580, 598 (1884) (a treaty "'is primarily a compact between independent nations,'" and "'depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it'")). Because we conclude that Sanchez-Llamas and Bustillo are not in any event entitled to relief on their claims, we find it unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights. Therefore, for purposes of addressing petitioners' claims, we assume, without deciding, that Article 36 does grant Bustillo and Sanchez-Llamas such rights.

A

Sanchez-Llamas argues that the trial court was required to suppress his statements to police because authorities never told him of his rights under Article 36. He refrains, however, from arguing that the Vienna Convention itself mandates suppression. We think this a wise concession. The Convention does not prescribe specific remedies for violations of Article 36. Rather, it expressly leaves the implementation of Article 36 to domestic law: Rights under Article 36 are to "be exercised in conformity with the laws and regulations of the receiving State." Art. 36(2), 21 U. S. T., at 101. As far as the text of the Convention is concerned, the question of the availability of the exclusionary rule for Article 36 violations is a matter of domestic law.

It would be startling if the Convention were read to require suppression. The exclusionary rule as we know it is an entirely American legal creation. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 415 (1971)

(Burger, C. J., dissenting) (the exclusionary rule "is unique to American jurisprudence"). More than 40 years after the drafting of the Convention, the automatic exclusionary rule applied in our courts is still "universally rejected" by other countries. Bradley, *Mapp* Goes Abroad, 52 Case W. Res. L. Rev. 375, 399–400 (2001); see also *Zicherman* v. *Korean Air Lines Co.*, 516 U. S. 217, 226 (1996) (postratification understanding "traditionally considered" as an aid to treaty interpretation). It is implausible that other signatories to the Convention thought it to require a remedy that nearly all refuse to recognize as a matter of domestic law. There is no reason to suppose that Sanchez-Llamas would be afforded the relief he seeks here in any of the other 169 countries party to the Vienna Convention.[3]

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[3] See Declaration of Ambassador Maura A. Harty, Annex 4 to Counter-Memorial of the United States in *Case Concerning Avena and other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. No. 128, p. A386, ¶ 41 (Oct. 25, 2003) (Harty Declaration) ("With the possible exception of Brazil, we are not aware of a single country that has a law, regulation or judicial decision requiring that a statement taken before consular notification and access automatically must be excluded from use at trial" (footnote omitted)). According to the Harty Declaration, the American Embassy in Brazil has been advised that Brazil considers consular notification to be a right under the Brazilian Constitution. Neither the declaration nor the parties point to a case in which a Brazilian court has suppressed evidence because of a violation of that right.

In a few cases, as several *amici* point out, the United Kingdom and Australia appear to have applied a discretionary rule of exclusion for violations of domestic statutes implementing the Vienna Convention. See Brief for United States as *Amicus Curiae* 26, and n. 9; Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 16–23. The dissent similarly relies on two cases from Australia, *post*, at 394 (opinion of BREYER, J.) (citing *Tan Seng Kiah* v. *Queen* (2001) 160 F. L. R. 26 (Crim. App. N. Terr.) and *Queen* v. *Tan* [2001] W. A. S. C. 275 (Sup. Ct. W. Aus. in Crim.)), where consular notification rights are governed by a domestic statute that provides rights beyond those required by Article 36 itself. See Crimes Act, No. 12, 1914, § 23p (Australia). The Canadian case on which the dissent relies, *post*, at 394–395, denied suppression, and concerned only the court's general discretionary authority to exclude a

For good reason then, Sanchez-Llamas argues only that suppression is required because it is the appropriate remedy for an Article 36 violation under United States law, and urges us to require suppression for Article 36 violations as a matter of our "authority to develop remedies for the enforcement of federal law in state-court criminal proceedings." Reply Brief for Petitioner in No. 04–10566, p. 11.

For their part, the State of Oregon and the United States, as *amicus curiae*, contend that we lack any such authority over state-court proceedings. They argue that our cases suppressing evidence obtained in violation of federal statutes are grounded in our supervisory authority over the federal courts—an authority that does not extend to state-court proceedings. Brief for Respondent in No. 04–10566, pp. 42–43; Brief for United States 32–34; see *McNabb* v. *United States*, 318 U. S. 332, 341 (1943) (suppressing evidence for violation of federal statute requiring persons arrested without a warrant to be promptly presented to a judicial officer); *Mallory* v. *United States*, 354 U. S. 449 (1957) (suppressing evidence for violation of similar requirement of Fed. Rule Crim. Proc. 5(a)); *Miller* v. *United States*, 357 U. S. 301 (1958) (suppressing evidence obtained incident to an arrest that violated 18 U. S. C. § 3109). Unless required to do so by the Convention itself, they argue, we cannot direct Oregon courts to exclude Sanchez-Llamas' statements from his criminal trial.

To the extent Sanchez-Llamas argues that we should invoke our supervisory authority, the law is clear: "It is beyond dispute that we do not hold a supervisory power over the courts of the several States." *Dickerson* v. *United States*, 530 U. S. 428, 438 (2000); see also *Smith* v. *Phillips*, 455 U. S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension"). The cases on

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confession "whose admission would adversely affect the fairness of an accused's trial." *Queen* v. *Partak* [2001] 160 C. C. C. 3d 553, ¶ 61 (Ont. Super. Ct. of J.).

which Sanchez-Llamas principally relies are inapplicable in light of the limited reach of our supervisory powers. *Mallory* and *McNabb* plainly rest on our supervisory authority. *Mallory, supra,* at 453; *McNabb, supra,* at 340. And while *Miller* is not clear about its authority for requiring suppression, we have understood it to have a similar basis. See *Ker* v. *California,* 374 U. S. 23, 31 (1963).

We also agree with the State of Oregon and the United States that our authority to create a judicial remedy applicable in state court must lie, if anywhere, in the treaty itself. Under the Constitution, the President has the power, "by and with the Advice and Consent of the Senate, to make Treaties." Art. II, § 2, cl. 2. The United States ratified the Convention with the expectation that it would be interpreted according to its terms. See 1 Restatement (Third) of Foreign Relations Law of the United States § 325(1) (1986) ("An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose"). If we were to require suppression for Article 36 violations without some authority in the Convention, we would in effect be supplementing those terms by enlarging the obligations of the United States under the Convention. This is entirely inconsistent with the judicial function. Cf. *The Amiable Isabella,* 6 Wheat. 1, 71 (1821) (Story, J.) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty").

Of course, it is well established that a self-executing treaty binds the States pursuant to the Supremacy Clause, and that the States therefore must recognize the force of the treaty in the course of adjudicating the rights of litigants. See, *e. g., Hauenstein* v. *Lynham,* 100 U. S. 483 (1880). And where a treaty provides for a particular judicial remedy,

there is no issue of intruding on the constitutional prerogatives of the States or the other federal branches. Courts must apply the remedy as a requirement of federal law. Cf. 18 U. S. C. §2515; *United States* v. *Giordano*, 416 U. S. 505, 524–525 (1974). But where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.

Sanchez-Llamas argues that the language of the Convention implicitly requires a judicial remedy because it states that the laws and regulations governing the exercise of Article 36 rights "must enable *full effect* to be given to the purposes for which the rights . . . are intended," Art. 36(2), 21 U. S. T., at 101 (emphasis added). In his view, although "full effect" may not automatically require an exclusionary rule, it does require an appropriate judicial remedy of *some* kind. There is reason to doubt this interpretation. In particular, there is little indication that other parties to the Convention have interpreted Article 36 to require a judicial remedy in the context of criminal prosecutions. See Department of State Answers to Questions Posed by the First Circuit in *United States* v. *Nai Fook Li*, No. 97–2034 etc., p. A–9 (Oct. 15, 1999) ("We are unaware of any country party to the [Vienna Convention] that provides remedies for violations of consular notification through its domestic criminal justice system").

Nevertheless, even if Sanchez-Llamas is correct that Article 36 implicitly requires a judicial remedy, the Convention equally states that Article 36 rights "shall be exercised in conformity with the laws and regulations of the receiving State." Art. 36(2), 21 U. S. T., at 101. Under our domestic law, the exclusionary rule is not a remedy we apply lightly. "[O]ur cases have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule." *Pennsylvania Bd. of Probation and Parole* v.

Scott, 524 U. S. 357, 364–365 (1998). Because the rule's social costs are considerable, suppression is warranted only where the rule's "'remedial objectives are thought most efficaciously served.'" *United States* v. *Leon*, 468 U. S. 897, 908 (1984) (quoting *United States* v. *Calandra*, 414 U. S. 338, 348 (1974)).

We have applied the exclusionary rule primarily to deter constitutional violations. In particular, we have ruled that the Constitution requires the exclusion of evidence obtained by certain violations of the Fourth Amendment, see *Taylor* v. *Alabama*, 457 U. S. 687, 694 (1982) (arrests in violation of the Fourth Amendment); *Mapp* v. *Ohio*, 367 U. S. 643, 655–657 (1961) (unconstitutional searches and seizures), and confessions exacted by police in violation of the right against compelled self-incrimination or due process, see *Dickerson*, 530 U. S., at 435 (failure to give *Miranda* warnings); *Payne* v. *Arkansas*, 356 U. S. 560, 568 (1958) (involuntary confessions).

The few cases in which we have suppressed evidence for statutory violations do not help Sanchez-Llamas. In those cases, the excluded evidence arose directly out of statutory violations that implicated important Fourth and Fifth Amendment interests. *McNabb*, for example, involved the suppression of incriminating statements obtained during a prolonged detention of the defendants, in violation of a statute requiring persons arrested without a warrant to be promptly presented to a judicial officer. We noted that the statutory right was intended to "avoid all the evil implications of secret interrogation of persons accused of crime," 318 U. S., at 344, and later stated that *McNabb* was "responsive to the same considerations of Fifth Amendment policy that . . . face[d] us . . . as to the States" in *Miranda*, 384 U. S., at 463. Similarly, in *Miller*, we required suppression of evidence that was the product of a search incident to an unlawful arrest. 357 U. S., at 305; see *California* v. *Hodari D.*, 499 U. S. 621, 624 (1991) ("We have long understood that

the Fourth Amendment's protection against 'unreasonable . . . seizures' includes seizure of the person").

The violation of the right to consular notification, in contrast, is at best remotely connected to the gathering of evidence. Article 36 has nothing whatsoever to do with searches or interrogations. Indeed, Article 36 does not guarantee defendants *any* assistance at all. The provision secures only a right of foreign nationals to have their consulate *informed* of their arrest or detention—not to have their consulate intervene, or to have law enforcement authorities cease their investigation pending any such notice or intervention. In most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police.

Moreover, the reasons we often require suppression for Fourth and Fifth Amendment violations are entirely absent from the consular notification context. We require exclusion of coerced confessions both because we disapprove of such coercion and because such confessions tend to be unreliable. *Watkins* v. *Sowders*, 449 U. S. 341, 347 (1981). We exclude the fruits of unreasonable searches on the theory that without a strong deterrent, the constraints of the Fourth Amendment might be too easily disregarded by law enforcement. *Elkins* v. *United States*, 364 U. S. 206, 217 (1960). The situation here is quite different. The failure to inform a defendant of his Article 36 rights is unlikely, with any frequency, to produce unreliable confessions. And unlike the search-and-seizure context—where the need to obtain valuable evidence may tempt authorities to transgress Fourth Amendment limitations—police win little, if any, practical advantage from violating Article 36. Suppression would be a vastly disproportionate remedy for an Article 36 violation.

Sanchez-Llamas counters that the failure to inform defendants of their right to consular notification gives them

"a misleadingly incomplete picture of [their] legal options," Brief for Petitioner in No. 04–10566, p. 42, and that suppression will give authorities an incentive to abide by Article 36.

Leaving aside the suggestion that it is the role of police generally to advise defendants of their legal options, we think other constitutional and statutory requirements effectively protect the interests served, in Sanchez-Llamas' view, by Article 36. A foreign national detained on suspicion of crime, like anyone else in our country, enjoys under our system the protections of the Due Process Clause. Among other things, he is entitled to an attorney, and is protected against compelled self-incrimination. See *Wong Wing* v. *United States*, 163 U. S. 228, 238 (1896) ("[A]ll persons within the territory of the United States are entitled to the protection guaranteed by" the Fifth and Sixth Amendments). Article 36 adds little to these "legal options," and we think it unnecessary to apply the exclusionary rule where other constitutional and statutory protections—many of them already enforced by the exclusionary rule—safeguard the same interests Sanchez-Llamas claims are advanced by Article 36.

Finally, suppression is not the only means of vindicating Vienna Convention rights. A defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police. If he raises an Article 36 violation at trial, a court can make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance. Of course, diplomatic avenues—the primary means of enforcing the Convention—also remain open.

In sum, neither the Vienna Convention itself nor our precedents applying the exclusionary rule support suppression of Sanchez-Llamas' statements to police.

B

The Virginia courts denied petitioner Bustillo's Article 36 claim on the ground that he failed to raise it at trial or on direct appeal. The general rule in federal habeas cases is

that a defendant who fails to raise a claim on direct appeal is barred from raising the claim on collateral review. See *Massaro* v. *United States*, 538 U. S. 500, 504 (2003); *Bousley* v. *United States*, 523 U. S. 614, 621 (1998). There is an exception if a defendant can demonstrate both "cause" for not raising the claim at trial, and "prejudice" from not having done so. *Massaro*, *supra*, at 504. Like many States, Virginia applies a similar rule in state postconviction proceedings, and did so here to bar Bustillo's Vienna Convention claim. Normally, in our review of state-court judgments, such rules constitute an adequate and independent state-law ground preventing us from reviewing the federal claim. *Coleman* v. *Thompson*, 501 U. S. 722, 729 (1991). Bustillo contends, however, that state procedural default rules cannot apply to Article 36 claims. He argues that the Convention requires that Article 36 rights be given "'full effect'" and that Virginia's procedural default rules "prevented any effect (much less 'full effect') from being given to" those rights. Brief for Petitioner in No. 05–51, p. 35 (emphasis deleted).

This is not the first time we have been asked to set aside procedural default rules for a Vienna Convention claim. Respondent Johnson and the United States persuasively argue that this question is controlled by our decision in *Breard* v. *Greene*, 523 U. S. 371 (1998) *(per curiam)*. In *Breard*, the petitioner failed to raise an Article 36 claim in state court—at trial or on collateral review—and then sought to have the claim heard in a subsequent federal habeas proceeding. *Id.*, at 375. He argued that "the Convention is the 'supreme law of the land' and thus trumps the procedural default doctrine." *Ibid.* We rejected this argument as "plainly incorrect," for two reasons. *Ibid.* First, we observed, "it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Ibid.* Furthermore, we reasoned that while treaty protections such as Article 36 may constitute supreme federal law, this is "no less true of provisions of the Constitu-

tion itself, to which rules of procedural default apply." *Id.*, at 376. In light of *Breard*'s holding, Bustillo faces an uphill task in arguing that the Convention requires States to set aside their procedural default rules for Article 36 claims.

Bustillo offers two reasons why *Breard* does not control his case. He first argues that *Breard*'s holding concerning procedural default was "unnecessary to the result," Brief for Petitioner in No. 05–51, at 45, because the petitioner there could not demonstrate prejudice from the default and because, in any event, a subsequent federal statute—the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214—superseded any right the petitioner had under the Vienna Convention to have his claim heard on collateral review. We find Bustillo's contention unpersuasive. Our resolution of the procedural default question in *Breard* was the principal reason for the denial of the petitioner's claim, and the discussion of the issue occupied the bulk of our reasoning. See 523 U. S., at 375–377. It is no answer to argue, as Bustillo does, that the holding in *Breard* was "unnecessary" simply because the petitioner in that case had several ways to lose. See *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 340 (1928).

Bustillo's second reason is less easily dismissed. He argues that since *Breard*, the ICJ has interpreted the Vienna Convention to preclude the application of procedural default rules to Article 36 claims. The *LaGrand Case (F. R. G.* v. *U. S.)*, 2001 I. C. J. 466 (Judgment of June 27) *(LaGrand)*, and the *Case Concerning Avena and other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. 12 (Judgment of Mar. 31) *(Avena)*, were brought before the ICJ by the governments of Germany and Mexico, respectively, on behalf of several of their nationals facing death sentences in the United States. The foreign governments claimed that their nationals had not been informed of their right to consular notification. They further argued that application of the procedural default rule to their nationals' Vienna Convention claims failed

to give "full effect" to the purposes of the Convention, as required by Article 36. The ICJ agreed, explaining that the defendants had procedurally defaulted their claims "because of the failure of the American authorities to comply with their obligation under Article 36." *LaGrand*, *supra*, at 497, ¶ 91; see also *Avena*, *supra*, at 57, ¶ 113. Application of the procedural default rule in such circumstances, the ICJ reasoned, "prevented [courts] from attaching any legal significance" to the fact that the violation of Article 36 kept the foreign governments from assisting in their nationals' defense. *LaGrand*, *supra*, at 497, ¶ 91; see also *Avena*, *supra*, at 57, ¶ 113.

Bustillo argues that *LaGrand* and *Avena* warrant revisiting the procedural default holding of *Breard*. In a similar vein, several *amici* contend that "the United States is *obligated* to comply with the Convention, *as interpreted by the ICJ*." Brief for ICJ Experts 11 (emphasis added). We disagree. Although the ICJ's interpretation deserves "respectful consideration," *Breard*, *supra*, at 375, we conclude that it does not compel us to reconsider our understanding of the Convention in *Breard*.[4]

Under our Constitution, "[t]he judicial Power of the United States" is "vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. That "judicial Power . . . extend[s] to . . . Treaties." *Id.*, § 2. And, as Chief Justice Marshall famously explained, that judicial power includes the duty "to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). If treaties are to be given effect as federal law

[4] The dissent, in light of *LaGrand* and *Avena*, "would read *Breard* . . . as not saying that the Convention *never* trumps any procedural default rule." *Post*, at 389 (opinion of BREYER, J.). This requires more than "reading an exception into *Breard*'s language," *post*, at 390, amounting instead to overruling *Breard*'s plain holding that the Convention does not trump the procedural default doctrine. While the appeal of such a course to a *Breard* dissenter may be clear, see 523 U. S., at 380 (BREYER, J., dissenting), "respectful consideration" of precedent should begin at home.

under our legal system, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department," headed by the "one supreme Court" established by the Constitution. *Ibid.*; see also *Williams* v. *Taylor*, 529 U. S. 362, 378–379 (2000) (opinion of STEVENS, J.) ("At the core of [the judicial] power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law"). It is against this background that the United States ratified, and the Senate gave its advice and consent to, the various agreements that govern referral of Vienna Convention disputes to the ICJ.

Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts.[5] The ICJ's decisions have "*no binding force* except between the parties and in respect of that particular case," Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T. S. No. 993 (1945) (emphasis added). Any interpretation of law the ICJ renders in the course of resolving particu-

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[5] The dissent's extensive list of lower court opinions that have "looked to the ICJ for guidance," *post*, at 384–385, is less impressive than first appears. Many of the cited opinions merely refer to, or briefly describe, ICJ decisions without in any way relying on them as authority. See, *e. g.*, *Committee of United States Citizens Living in Nicaragua* v. *Reagan*, 859 F. 2d 929, 932, 935 (CADC 1988); *Conservation Law Foundation of New England* v. *Secretary of Interior*, 790 F. 2d 965, 967 (CA1 1986); *Narenji* v. *Civiletti*, 617 F. 2d 745, 748 (CADC 1979); *Diggs* v. *Richardson*, 555 F. 2d 848, 849 (CADC 1976); *Rogers* v. *Societe Internationale Pour Participations Industrielles et Commerciales, S. A.*, 278 F. 2d 268, 273, n. 3 (CADC 1960) (Fahy, J., dissenting). Others cite ICJ opinions alongside law review articles for general propositions about international law. See, *e. g.*, *McKesson Corp.* v. *Islamic Republic of Iran*, 52 F. 3d 346, 352 (CADC 1995); *Princz* v. *Federal Republic of Germany*, 26 F. 3d 1166, 1180, 1184 (CADC 1994) (Wald, J., dissenting); *Sadat* v. *Mertes*, 615 F. 2d 1176, 1187, n. 14 (CA7 1980) *(per curiam)*; *United States* v. *Postal*, 589 F. 2d 862, 869 (CA5 1979). Moreover, all but two of the cited decisions from this Court concern technical issues of boundary demarcation. See *post*, at 384.

lar disputes is thus not binding precedent *even as to the ICJ itself;* there is accordingly little reason to think that such interpretations were intended to be controlling on our courts. The ICJ's principal purpose is to arbitrate particular disputes between national governments. Art. 1, *id.*, at 1055 (ICJ is "the principal judicial organ of the United Nations"); see also Art. 34, *id.*, at 1059 ("Only states [*i. e.*, countries] may be parties in cases before the Court"). While each member of the United Nations has agreed to comply with decisions of the ICJ "in any case to which it is a party," United Nations Charter, Art. 94(1), 59 Stat. 1051, T. S. No. 993 (1945), the Charter's procedure for noncompliance—referral to the Security Council by the aggrieved state—contemplates quintessentially *international* remedies, Art. 94(2), *ibid.*

In addition, "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." *Kolovrat* v. *Oregon*, 366 U. S. 187, 194 (1961). Although the United States has agreed to "discharge its international obligations" in having state courts give effect to the decision in *Avena*, it has not taken the view that the ICJ's interpretation of Article 36 is binding on our courts. President Bush, Memorandum for the Attorney General (Feb. 28, 2005), App. to Brief for United States as *Amicus Curiae* in *Medellín* v. *Dretke*, O. T. 2004, No. 04–5928, p. 9a. Moreover, shortly after *Avena*, the United States withdrew from the Optional Protocol concerning Vienna Convention disputes. Whatever the effect of *Avena* and *LaGrand* before this withdrawal, it is doubtful that our courts should give decisive weight to the interpretation of a tribunal whose jurisdiction in this area is no longer recognized by the United States.

LaGrand and *Avena* are therefore entitled only to the "respectful consideration" due an interpretation of an international agreement by an international court. *Breard*, 523

U. S., at 375. Even according such consideration, the ICJ's interpretation cannot overcome the plain import of Article 36. As we explained in *Breard*, the procedural rules of domestic law generally govern the implementation of an international treaty. *Ibid.* In addition, Article 36 makes clear that the rights it provides "shall be exercised in conformity with the laws and regulations of the receiving State" provided that "full effect . . . be given to the purposes for which the rights accorded under this Article are intended." Art. 36(2), 21 U. S. T., at 101. In the United States, this means that the rule of procedural default—which applies even to claimed violations of our Constitution, see *Engle* v. *Isaac*, 456 U. S. 107, 129 (1982)—applies also to Vienna Convention claims. Bustillo points to nothing in the drafting history of Article 36 or in the contemporary practice of other signatories that undermines this conclusion.

The ICJ concluded that where a defendant was not notified of his rights under Article 36, application of the procedural default rule failed to give "full effect" to the purposes of Article 36 because it prevented courts from attaching "legal significance" to the Article 36 violation. *LaGrand*, 2001 I. C. J., at 497–498, ¶¶ 90–91. This reasoning overlooks the importance of procedural default rules in an adversary system, which relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication. See *Castro* v. *United States*, 540 U. S. 375, 386 (2003) (SCALIA, J., concurring in part and concurring in judgment) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief"). Procedural default rules are designed to encourage parties to raise their claims promptly and to vindicate "the law's important interest in the finality of judgments." *Massaro*, 538 U. S., at 504. The consequence of failing to raise a claim for adjudication at the proper time is generally forfeiture of that

claim. As a result, rules such as procedural default routinely deny "legal significance"—in the *Avena* and *LaGrand* sense—to otherwise viable legal claims.

Procedural default rules generally take on greater importance in an adversary system such as ours than in the sort of magistrate-directed, inquisitorial legal system characteristic of many of the other countries that are signatories to the Vienna Convention. "What makes a system adversarial rather than inquisitorial is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties." *McNeil* v. *Wisconsin*, 501 U. S. 171, 181, n. 2 (1991). In an inquisitorial system, the failure to raise a legal error can in part be attributed to the magistrate, and thus to the state itself. In our system, however, the responsibility for failing to raise an issue generally rests with the parties themselves.

The ICJ's interpretation of Article 36 is inconsistent with the basic framework of an adversary system. Under the ICJ's reading of "full effect," Article 36 claims could trump not only procedural default rules, but any number of other rules requiring parties to present their legal claims at the appropriate time for adjudication. If the state's failure to inform the defendant of his Article 36 rights generally excuses the defendant's failure to comply with relevant procedural rules, then presumably rules such as statutes of limitations and prohibitions against filing successive habeas petitions must also yield in the face of Article 36 claims. This sweeps too broadly, for it reads the "full effect" proviso in a way that leaves little room for Article 36's clear instruction that Article 36 rights "shall be exercised in conformity with the laws and regulations of the receiving State." Art. 36(2), 21 U. S. T., at 101.[6]

[6]The dissent would read the ICJ's decisions to require that procedural default rules give way only where "the State is unwilling to provide some other effective remedy, for example (if the lawyer acts incompetently

Much as Sanchez-Llamas cannot show that suppression is an appropriate remedy for Article 36 violations under domestic law principles, so too Bustillo cannot show that normally applicable procedural default rules should be suspended in light of the type of right he claims. In this regard, a comparison of Article 36 and a suspect's rights under *Miranda* disposes of Bustillo's claim. Bustillo contends that applying procedural default rules to Article 36 rights denies such rights "full effect" because the violation itself—*i. e.*, the failure to inform defendants of their right to

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in respect to Convention rights of which the lawyer was aware) an ineffective-assistance-of-counsel claim." *Post*, at 388 (opinion of BREYER, J.). But both *LaGrand* and *Avena* indicate that the availability of a claim of ineffective assistance of counsel is *not* an adequate remedy for an Article 36 violation. See *LaGrand Case (F. R. G. v. U. S.)*, 2001 I. C. J. 466, 497, ¶ 91 (Judgment of June 27) (requiring suspension of state procedural default rule even though "United States courts could and did examine the professional competence of counsel assigned to the indigent LaGrands by reference to United States constitutional standards"); see also *Case Concerning Avena and other Mexican Nationals (Mex. v. U. S.)*, 2004 I. C. J. 12, 63, ¶ 134 (Judgment of Mar. 31).

To the extent the dissent suggests that the ICJ's decisions could be read to prevent application of procedural default rules where a defendant's attorney is unaware of Article 36, see *post*, at 387–388 (opinion of BREYER, J.), this interpretation of the Convention is in sharp conflict with the role of counsel in our system. "Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" *Coleman* v. *Thompson*, 501 U. S. 722, 753 (1991) (quoting *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986)). Under our system, an attorney's lack of knowledge does not excuse the defendant's default, unless the attorney's overall representation falls below what is required by the Sixth Amendment. In any event, Bustillo himself does not argue that the applicability of procedural default rules hinges on whether a foreign national's attorney was aware of Article 36. See Brief for Petitioner in No. 05–51, p. 38 ("A lawyer may not, consistent with the purposes of Article 36, unilaterally forfeit a foreign national's opportunity to communicate with his consulate"). In fact, Bustillo has conceded that his "attorney at trial was aware of his client's rights under the Vienna Convention." App. in No. 05–51, at 203, n. 5.

consular notification—prevents them from becoming aware of their Article 36 rights and asserting them at trial. Of course, precisely the same thing is true of rights under *Miranda*. Police are required to advise suspects that they have a right to remain silent and a right to an attorney. See *Miranda*, 384 U. S., at 479; see also *Dickerson*, 530 U. S., at 435. If police do not give such warnings, and counsel fails to object, it is equally true that a suspect may not be "aware he even *had* such rights until well after his trial had concluded." Brief for Petitioner in No. 05–51, at 35. Nevertheless, it is well established that where a defendant fails to raise a *Miranda* claim at trial, procedural default rules may bar him from raising the claim in a subsequent postconviction proceeding. *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977).

Bustillo responds that an Article 36 claim more closely resembles a claim, under *Brady* v. *Maryland*, 373 U. S. 83 (1963), that the prosecution failed to disclose exculpatory evidence—a type of claim that often can be asserted for the first time only in postconviction proceedings. See *United States* v. *Dominguez Benitez*, 542 U. S. 74, 83, n. 9 (2004). The analogy is inapt. In the case of a *Brady* claim, it is impossible for the defendant to know as a *factual* matter that a violation has occurred before the exculpatory evidence is disclosed. By contrast, a defendant is well aware of the fact that he was not informed of his Article 36 rights, even if the *legal* significance of that fact eludes him.

Finally, relying on *Massaro* v. *United States*, 538 U. S. 500 (2003), Bustillo argues that Article 36 claims "are most appropriately raised post-trial or on collateral review." Brief for Petitioner in No. 05–51, at 39. *Massaro* held that claims of ineffective assistance of counsel may be raised for the first time in a proceeding under 28 U. S. C. § 2255. That decision, however, involved the question of the proper forum for *federal* habeas claims. Bustillo, by contrast, asks us to require the *States* to hear Vienna Convention claims raised for the

first time in *state* postconviction proceedings. Given that the Convention itself imposes no such requirement, we do not perceive any grounds for us to revise state procedural rules in this fashion. See *Dickerson*, *supra*, at 438.

We therefore conclude, as we did in *Breard*, that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims.

* * *

Although these cases involve the delicate question of the application of an international treaty, the issues in many ways turn on established principles of domestic law. Our holding in no way disparages the importance of the Vienna Convention. The relief petitioners request is, by any measure, extraordinary. Sanchez-Llamas seeks a suppression remedy for an asserted right with little if any connection to the gathering of evidence; Bustillo requests an exception to procedural rules that is accorded to almost no other right, including many of our most fundamental constitutional protections. It is no slight to the Convention to deny petitioners' claims under the same principles we would apply to an Act of Congress, or to the Constitution itself.

The judgments of the Supreme Court of Oregon and the Supreme Court of Virginia are affirmed.

It is so ordered.

JUSTICE GINSBURG, concurring in the judgment.

I agree that Article 36 of the Vienna Convention grants rights that may be invoked by an individual in a judicial proceeding, and therefore join Part II of JUSTICE BREYER's dissenting opinion. As to the suppression and procedural default issues, I join the Court's judgment. The dissenting opinion veers away from the two cases here for review, imagining other situations unlike those at hand. In neither of the cases before us would I remand for further proceedings.

I turn first to the question whether a violation of Article 36 requires suppression of statements to police officers in Sanchez-Llamas' case and others like it. Shortly after his arrest and in advance of any police interrogation, Sanchez-Llamas received the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966), in both English and Spanish. Tr. 122 (Nov. 16, 2000). He indicated that he understood those warnings, *id.*, at 123, telling the police that he had lived in the United States for approximately 11 years, *id.*, at 124, 143, 177. After a break in questioning, Sanchez-Llamas again received *Miranda* warnings in Spanish, and again indicated that he understood them. Tr. 129, 176. Sanchez-Llamas, with his life experience in the United States, scarcely resembles the uncomprehending detainee imagined by JUSTICE BREYER, *post*, at 393. Such a detainee would have little need to invoke the Vienna Convention, for *Miranda* warnings a defendant is unable to comprehend give the police no green light for interrogation. *Moran* v. *Burbine*, 475 U. S. 412, 421 (1986) (a defendant's waiver of *Miranda* rights must be voluntary, knowing, and intelligent, *i. e.*, "the product of a free and deliberate choice . . . made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it"); *United States* v. *Garibay*, 143 F. 3d 534, 537–540 (CA9 1998) (defendant, who had difficulty understanding English, did not knowingly and intelligently waive his *Miranda* rights where the police recited the *Miranda* warnings only in English); *United States* v. *Short*, 790 F. 2d 464, 469 (CA6 1986) (defendant's limited comprehension of English cast substantial doubt on the validity of her *Miranda* waiver).[1]

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[1] Before trial, Sanchez-Llamas moved to suppress his statements to police on voluntariness grounds. The trial court denied the motion, finding that clear and convincing evidence established Sanchez-Llamas' knowing, voluntary, and intelligent waiver of his *Miranda* rights. Tr. 232 (Nov. 16, 2000); App. to Pet. for Cert. in No. 04–10566, pp. 10–11. Neither the Oregon Court of Appeals nor the Oregon Supreme Court addressed Sanchez-

In contrast to *Miranda* warnings, which must be given on the spot before the police interrogate, Article 36 of the Vienna Convention does not require the arresting authority to contact the consular post instantly. See *Case Concerning Avena and other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. 12, ¶ 97 (Judgment of Mar. 31) *(Avena)* (United States's notification of Mexican consulate within three working days of detainee's arrest satisfied Article 36(1)(b)'s "without delay" requirement); U. S. Dept. of State, Consular Notification and Access 20, http://travel.state.gov/pdf/CNA_book.pdf (as visited June 26, 2006, and available in Clerk of Court's case file) (directing federal, state, and local law enforcement officials to notify the appropriate consular post "within 24 hours, and certainly within 72 hours" of a foreign national's request that such notification be made). Nor does that article demand that questioning await notice to, and a response from, consular officials.[2] It is unsurprising, therefore, that the well researched dissenting opinion has not found even a single case in which any court, any place has *in fact* found suppression an appropriate remedy based on no provision of domestic law, but solely on an arresting officer's failure to comply with Article 36 of the Vienna Convention. See *post*, at 395–396; *ante*, at 344–345, n. 3.

Llamas' voluntariness challenge, and this Court declined to review the question.

[2] See Declaration of Ambassador Maura A. Harty, Annex 4 to Counter-Memorial of the United States in *Case Concerning Avena and other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. No. 128, pp. A385–A386, ¶¶ 34–38 (Oct. 25, 2003) (observing that some Convention signatories do not permit consular access until after the detainee has been questioned, and that, even in countries that permit immediate consular access, access often does not occur until after interrogation); cf. *Avena*, 2004 I. C. J., at 49, ¶ 87 (recognizing that Article 36(1)(b)'s requirement that authorities "'inform the person concerned without delay of his rights' cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36").

The Court points out, and I agree, that in fitting circumstances, a defendant might successfully "raise an Article 36 claim as part of a broader challenge to the voluntariness of [a detainee's] statements to police." *Ante*, at 350. In that way, "full effect" could be given to Article 36 in a manner consistent with U. S. rules and regulations. But the question presented here is whether suppression is warranted simply because the State's authorities failed to comply with Article 36 of the Vienna Convention. Neither the Convention itself nor the practice of our treaty partners establishes Sanchez-Llamas' entitlement to such a remedy. See *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U. S. 155, 175–176 (1999) (construing the Warsaw Convention in accord with the views of the United States's treaty partners).

As to the procedural default issue, I note first two anomalies. The Court explains, and I agree, that it would be extraordinary to hold that defendants, unaware of their *Miranda* rights because the police failed to convey the required warnings, would be subject to a State's procedural default rules, but defendants not told of Article 36 rights would face no such hindrance. See *ante*, at 359. Furthermore, as the dissent apparently recognizes, in the federal-court system, a later-in-time statute, codifying a federal procedural default rule, would "supersed[e] any inconsistent provision in the Convention." *Post*, at 388 (citing *Breard* v. *Greene*, 523 U. S. 371 (1998) *(per curiam)*). In my view, it would be unseemly, to say the least, for this Court to command state courts to relax their identical, or even less stringent procedural default rules, while federal courts operate without constraint in this regard. *Post*, at 388–389. That state of affairs, surely productive of friction in our federal system, should be resisted if there is a plausible choice, *i. e.*, if a reasonable interpretation of the federal statute and international accord would avoid the conflict.

Critical for me, Bustillo has conceded that his "attorney at trial was aware of his client's rights under the Vienna

Convention." App. in No. 05–51, p. 203, n. 5. Given the knowledge of the Vienna Convention that Bustillo's lawyer possessed, this case fails to meet the dissent's (and the International Court of Justice's) first condition for overriding a State's ordinary procedural default rules: "[T]he [Vienna] Convention forbids American States to apply a procedural default rule to bar assertion of a Convention violation claim 'where it has been the failure of the United States [or of a State] itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial.'" *Post*, at 381 (quoting *Avena*, 2004 I. C. J., at 57, ¶ 113; emphasis deleted); accord *post*, at 370, 379, 382, 386. Nothing the State did or omitted to do here "precluded counsel from . . . rais[ing] the question of a violation of the Vienna Convention in the initial trial." *Post*, at 386. Had counsel done so, the trial court could have made "appropriate accommodations to ensure that the defendant secure[d], to the extent possible, the benefits of consular assistance." *Ante*, at 350.[3]

In short, if there are some times when a Convention violation, standing alone, might warrant suppression, or the displacement of a State's ordinarily applicable procedural

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[3] Furthermore, once Bustillo became aware of his Vienna Convention rights, nothing prevented him from raising an ineffective-assistance-of-counsel claim predicated on his trial counsel's failure to assert the State's violation of those rights. Through such a claim, as the dissent acknowledges, see *post*, at 379, 382, 388, 392, "full effect" could have been given to Article 36, without dishonoring state procedural rules that are compatible with due process. Bustillo did not include a Vienna-Convention-based, ineffective-assistance-of-counsel claim along with his direct Vienna Convention claim in his initial habeas petition. He later sought to amend his petition to add an ineffective-assistance-of-counsel claim, but the court held that the amendment did not relate back to the initial pleading. Tr. of Oral Arg. 26, 42. The state court therefore rejected Bustillo's ineffectiveness claim as barred by the applicable state statute of limitations. App. 132. Bustillo did not seek review of that decision in this Court.

default rules, neither Sanchez-Llamas' case nor Bustillo's belongs in that category.

* * *

For the reasons stated, I would not disturb the judgments of the Supreme Court of Oregon and the Supreme Court of Virginia.

JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE SOUTER join, and with whom JUSTICE GINSBURG joins as to Part II, dissenting.

The Vienna Convention on Consular Relations (Vienna Convention or Convention) provides that when the police of a signatory nation arrest a foreign national, the detaining "authorities shall inform" the foreign national "without delay" of his "righ[t]" to communicate with his nation's consular officers. Arts. 36(1)(a), (b), Apr. 24, 1963, [1970] 21 U. S. T. 77, 100–101, T. I. A. S. No. 6820. We granted certiorari in these cases to consider three related questions: (1) May a criminal defendant raise a claim (at trial or in a postconviction proceeding) that state officials violated this provision? (2) May a State apply its usual procedural default rules to Convention claims, thereby denying the defendant the right to raise the claim in a postconviction proceeding on the ground that the defendant failed to raise the claim at trial? And (3) is suppression of a defendant's confession (made to police after a violation of the Convention) an appropriate remedy?

The Court assumes, but does not decide, that the answer to the first question is "yes." *Ante*, at 343. It answers the second question by holding that a State always may apply its ordinary procedural default rules to a defendant's claim of a Convention violation. *Ante*, at 350–360. Its answer to the third question is that suppression is never an appropriate remedy for a Convention violation. *Ante*, at 343–350.

Unlike the majority, I would decide the first question and answer it affirmatively. A criminal defendant may, at trial or in a postconviction proceeding, raise the claim that state authorities violated the Convention in his case. My answer to the second question is that *sometimes* state procedural default rules must yield to the Convention's insistence that domestic laws "enable full effect to be given to the purposes for which" Article 36's "rights . . . are intended." Art. 36(2), 21 U. S. T., at 101. And my answer to the third question is that suppression may *sometimes* provide an appropriate remedy. After answering these questions, I would remand these cases, thereby permitting the States to apply their own procedural and remedial laws, but with the understanding that the Federal Constitution requires that the application of those laws be consistent with the Convention's demand for an effective remedy for an Article 36 violation. See U. S. Const., Art. VI, cl. 2 ("[A]ll Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby").

I

A

The Vienna Convention is an international treaty that governs relations between individual nations and foreign consular officials. The United States and 169 other nations have ratified the Convention. Its adoption in 1963 was perhaps "the single most important event in the entire history of the consular institution." L. Lee, Consular Law and Practice 26 (2d ed. 1991). The Convention defines consular functions to include "protecting in the receiving State the interests of the sending State and of its nationals," and "helping and assisting nationals . . . of the sending State." Arts. 5(a), (e), 21 U. S. T., at 82–83. The United States ratified the Convention in 1969.

Article 36 of the Convention governs relations between a consulate and its nationals, particularly those who have been arrested by the host country. Its object is to assure consular communication and assistance to such nationals, who may not fully understand the host country's legal regime or even speak its language. Article 36 reads as follows:

> "1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> "(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> "(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;*
>
> . . . . .
>
> "2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." 21 U. S. T., at 100–101 (emphasis added).

The U. S. State Department's Foreign Affairs Manual has long stressed the importance the United States places upon these provisions. It says, "[O]ne of the basic functions of a

consular officer has been to provide a 'cultural bridge' between the host community and the [U. S. national]. No one needs that cultural bridge more than the individual U. S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail." 7 Foreign Affairs Manual § 401 (1984); see also *id.*, §§ 401–426 (2004).

B

In 1969, the United States also ratified (but the President has since withdrawn from) an Optional Protocol to the Convention. See Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), Apr. 24, 1963, [1970] 21 U. S. T. 325, T. I. A. S. No. 6820; Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005) (giving notice of United States' withdrawal from the Optional Protocol). The Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice [ICJ]." Art. I, 21 U. S. T., at 326.

Acting pursuant to the Optional Protocol, Germany (in 1999) and Mexico (in 2003) brought proceedings before the ICJ, seeking redress for what they said were violations of Article 36 by the United States. *LaGrand Case (F. R. G.* v. *U. S.)*, 2001 I. C. J. 466 (Judgment of June 27) *(LaGrand)*; *Case Concerning Avena and other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. 12 (Judgment of Mar. 31) *(Avena)*.

In Germany's case, the ICJ rejected the United States' claim that the "rights of consular notification and access under [Article 36] are rights of States, and not of individuals." *LaGrand*, 2001 I. C. J., at 493, ¶ 76. It held instead that (1) if an arrested foreign national is prejudiced by the host country's failure to inform him of his Article 36 rights, and (2) if that individual has "been subjected to prolonged detention or convicted and sentenced to severe penalties," then a diplomatic apology alone is not a sufficient remedy.

Id., at 513–514, ¶ 125. Rather, the Convention requires the host country, in that case the United States, "to allow the review and reconsideration of the" foreign national's "conviction and sentence by taking account of the violation of the rights set forth in the Convention." *Id.*, at 514, ¶125. The ICJ added that "[t]he choice of means" for providing this review "must be left to the United States." *Ibid.* In addition, the ICJ stated that in the case before it, application of a procedural default rule (that is, the rule that the LaGrands could not bring their Convention claims in habeas proceedings because they had not raised those claims at trial) violated Article 36(2) of the Convention because it "had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended.'" *Id.*, at 498, ¶ 91 (quoting Art. 36(2), 21 U. S. T., at 101). In the ICJ's view, it was "the failure of the American authorities to comply" with Article 36 that prevented the LaGrands from raising their claims earlier. *LaGrand, supra*, at 497, ¶ 91.

In Mexico's case, the ICJ reiterated its view that Article 36, in addition to imposing obligations on member nations, also allows foreign nationals to bring claims based on those violations in domestic judicial proceedings. The ICJ noted that, as a matter of international law, breach of a treaty ordinarily "'involves an obligation to make reparation in an adequate form.'" *Avena, supra*, at 59, ¶ 119 (quoting *Factory at Chorzów, Jurisdiction*, 1927, P. C. I. J., ser. A, No. 9, p. 21). Applying that principle to the Convention, the ICJ concluded that "the remedy to make good . . . violations [of Article 36] should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts . . . with a view to ascertaining whether in each case the violation . . . *caused actual prejudice* to the defendant in the process of administration of criminal justice." *Avena*, 2004 I. C. J., at 60, ¶ 121 (emphasis added). The court added that this "'review and reconsideration,'" to

be "effective," must "fully examin[e] and tak[e] into account" any such prejudice to the defendant. *Id.*, at 65, ¶ 138. The ICJ declined to specify the means by which American courts should provide such "review and reconsideration." Instead, the ICJ said, the appropriate remedy depends upon an examination of "the concrete circumstances of each case" and should be determined "by the United States courts concerned in the process of their review and reconsideration." *Id.*, at 61, ¶ 127.

In respect to procedural default, the ICJ referenced what it said in *LaGrand*, while adding the critically important qualification that the cases in which the Convention blocked application of a procedural default rule were those in which it was "the failure of the United States itself to inform" an arrested foreign national of his right to contact the consulate that "precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial." *Avena*, *supra*, at 57, ¶ 113.

C

For present purposes, the key sections of the Convention are (1) the provision that requires the United States to "inform" an arrested person "without delay" of his Article 36 rights, including the right to "communicat[e]" with his "consular post," and (2) the provision that says domestic laws and regulations "must enable full effect to be given" to the purposes underlying those requirements.

The key ICJ holdings are its determinations (1) that the Convention obligates a member nation to inform an arrested foreign national without delay that he may contact his consulate; (2) that the Convention requires the United States to provide some process for its courts to "review and reconside[r]" criminal convictions where there has been a prejudicial violation of this obligation; and (3) that this "review and reconsideration" cannot be foreclosed on the ground that the foreign national did not raise the violation at trial *where the*

authorities' failure to inform the foreign national of his rights prevented him from timely raising his claim.

II

The first question presented is whether a criminal defendant may raise a claim (at trial or in a postconviction proceeding) that state officials violated Article 36 of the Convention. The Court assumes that the answer to this question is "yes," but it does not decide the matter because it concludes in any event that the petitioners are not entitled to the remedies they seek. As explained below, I would resolve those remedial questions differently. Hence, I must decide, rather than assume, the answer to the first question presented.

Regardless, the first question raises an important issue of federal law that has arisen hundreds of times in the lower federal and state courts. See generally Wooster, Construction and Application of Vienna Convention on Consular Relations (VCCR), Requiring That Foreign Consulate Be Notified When One of Its Nationals Is Arrested, 175 A. L. R. Fed. 243 (2002) (collecting federal cases). Those courts have divided as to the proper answer. Compare *Cardenas* v. *Dretke*, 405 F. 3d 244 (CA5 2005) (defendant cannot bring Convention claim in judicial proceeding); *United States* v. *Emuegbunam*, 268 F. 3d 377 (CA6 2001) (same); *State* v. *Martinez-Rodriguez*, 2001–NMSC–029, 33 P. 3d 267 (same); 338 Ore. 267, 108 P. 3d 573 (2005) (same); *Shackleford* v. *Commonwealth*, 262 Va. 196, 547 S. E. 2d 899 (2001) (same), with *Jogi* v. *Voges*, 425 F. 3d 367 (CA7 2005) (defendant can bring Convention claim in judicial proceeding). And the issue often arises in a legal context where statutes or procedural requirements arguably block this Court's speedy review. See *Medellín* v. *Dretke*, 544 U. S. 660 (2005) *(per curiam)*. We granted the petitions for certiorari in significant part in order to decide this question. And, given its importance, we should do so.

In answering the question, it is common ground that the Convention is "self-executi[ng]." See S. Exec. Rep. No. 91–9, p. 5 (1969); see also Brief for Respondent in No. 04–10566, pp. 9–10; Brief for Respondent in No. 05–51, p. 23. That is to say, the Convention "operates of itself without the aid of any legislative provision." *Foster* v. *Neilson*, 2 Pet. 253, 314 (1829). The parties also agree that we need not decide whether the Convention creates a "private right of action," *i. e.*, a private right that would allow an individual to bring a lawsuit for enforcement of the Convention or for damages based on its violation. Rather, the question here is whether the Convention provides, in these cases, law applicable in legal proceedings that might have been brought irrespective of the Vienna Convention claim, here an ordinary criminal appeal and an ordinary postconviction proceeding.

Bustillo, for example, has brought an action under a Virginia statute that allows any convicted person to seek release from custody on the ground that "he is detained without lawful authority." Va. Code Ann. §8.01–654(A)(1) (Lexis Supp. 2006). Sanchez-Llamas has challenged his state criminal conviction on direct appeal, and in that proceeding he is entitled to claim that his conviction violates state or federal law. In both cases, the petitioners argue that a court decision favoring the prosecution would violate the Convention (as properly interpreted), and therefore the Constitution forbids any such decision. See U. S. Const., Art. VI, cl. 2. This argument in effect claims that the Convention itself provides applicable law that here would favor the petitioners if, but only if, they are correct as to their interpretation of the Convention (which is, of course, a different matter).

The petitioners must be right in respect to their claim that the Convention provides law that here courts could apply in their respective proceedings. The Convention is a treaty. And "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." *Ibid.* As

Chief Justice Marshall long ago explained, under the Supremacy Clause a treaty is "to be regarded in Courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." *Foster, supra,* at 314.

Directly to the point, this Court stated long ago that a treaty "is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice," in such a case the court is to "resor[t] to the treaty for a rule of decision for the case before it as it would to a statute." *Head Money Cases,* 112 U. S. 580, 598–599 (1884).

As noted above, see *supra,* at 372, the parties agree that the Convention "operates of itself without the aid of any legislative provision." *Foster, supra,* at 314. The question, then, is the one this Court set forth in the *Head Money Cases:* Does the Convention set forth a "law" with the legal stature of an Act of Congress? And as the Court explained, we are to answer that question by asking, does the Convention "prescribe a rule by which the rights of the private citizen . . . may be determined"? Are the obligations set forth in Article 36(1)(b) "of a nature to be enforced in a court of justice"?

The "nature" of the Convention provisions raised by the petitioners indicates that they are intended to set forth standards that are judicially enforceable. Those provisions consist of the rights of a foreign national "arrested" or "detained in any other manner" (1) to have, on his "reques[t]," the "consular post" "inform[ed]" of that arrest or detention; (2) to have forwarded "without delay" any "communication addressed to the consular post"; and (3) to be "inform[ed] . . . without delay" of those two "rights." Art. 36(1)(b), 21 U. S. T., at 101. These rights do not differ in their "nature" from other procedural rights that courts commonly enforce. Cf. U. S. Const., Amdt. 6 ("In all criminal

prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation"); *ibid.* ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"); *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

Moreover, the language of Article 36 speaks directly of the "rights" of the individual foreign national. See Art. 36(1)(b), 21 U. S. T., at 101 ("The said authorities shall inform the person concerned without delay of *his rights* under this subparagraph" (emphasis added)). Article 36 thus stands in stark contrast to other provisions of the Convention, which speak in terms of the rights of the member nations or consular officials. Cf. Art. 9, *id.*, at 86 (discussing "the *right of* any of the *Contracting Parties* to fix the designation of consular officers" (emphasis added)); Art. 34, *id.*, at 98 (consular officials shall have "freedom of movement and travel"); Art. 35(1), *id.*, at 99 (consular officials shall have "freedom of communication"); Art. 41(1), *id.*, at 103 ("Consular officers shall not be liable to arrest or detention pending trial").

Suppose that a pre-*Miranda* federal statute had said that arresting authorities "shall inform a detained person without delay of his right to counsel." Would courts not have automatically assumed that this statute created applicable law that a criminal defendant could invoke at trial? What more would the statute have to say? See *Medellín*, 544 U. S., at 687 (O'Connor, J., dissenting) ("And if a statute were to provide, for example, that arresting authorities 'shall inform a detained person without delay of his right to counsel,'" what "more would be required" to permit "a defendant" to "invoke that statute"?).

Further, this Court has routinely permitted individuals to enforce treaty provisions similar to Article 36 in domestic judicial proceedings. In *United States* v. *Rauscher*, 119 U. S. 407, 410–411 (1886), for example, this Court concluded that the defendant could raise as a defense in his federal criminal trial the violation of an extradition treaty that said:

"'It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them . . . deliver up to justice all persons'" charged with certain crimes in the other country. Similarly, in *Kolovrat* v. *Oregon*, 366 U. S. 187, 191, n. 6 (1961), the Court held that foreign nationals could challenge a state law limiting their right to recover an inheritance based on a treaty providing that "'[i]n all that concerns the right of acquiring, possessing or disposing of every kind of property . . . citizens of [each country who reside in the other] shall enjoy the rights which the respective laws grant . . . in each of these states to the subjects of the most favored nation.'" And in *Asakura* v. *Seattle*, 265 U. S. 332, 340 (1924), the Court allowed a foreign national to challenge a city ordinance forbidding noncitizens from working as pawnbrokers under a treaty stating that "'citizens or subjects of each of the High Contracting Parties shall have liberty . . . to carry on trade'" and "'generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects.'"

In all these cases, the Court recognized that (1) a treaty obligated the United States to treat foreign nationals in a certain manner; (2) the obligation had been breached by the Government's conduct; and (3) the foreign national could therefore seek redress for that breach in a judicial proceeding, even though the treaty did not specifically mention judicial enforcement of its guarantees or even expressly state that its provisions were intended to confer rights on the foreign national. Language and context argue yet more strongly here in favor of permitting a criminal defendant in an appropriate case to find in the Convention a law to apply in the proceeding against him.

In addition, the Government concedes that individual consular officials may enforce *other* provisions of the Convention in American courts. For example, Article 43(1) grants consular officials immunity from "the jurisdiction of the" host country's "judicial or administrative authorities" for

"acts performed in the exercise of consular functions." 21 U. S. T., at 104. The federal courts have held that a consular official may raise Article 43(1) in a judicial proceeding, even though that provision does not expressly mention a judicial remedy. See, *e. g.*, *Risk* v. *Halvorsen*, 936 F. 2d 393, 397 (CA9 1991); *Gerritsen* v. *de la Madrid Hurtado*, 819 F. 2d 1511, 1515–1516 (CA9 1987); see also Brief for United States as *Amicus Curiae* 14, n. 2 (citing with approval these cases). What in Article 36 warrants treating it differently in this respect?

Finally, the international tribunal that the United States agreed would resolve disputes about the interpretation of the Convention, the ICJ, has twice ruled that an arrested foreign national may raise a violation of the arresting authorities' obligation to "inform [him] without delay of his rights under" Article 36(1) in an American judicial proceeding. See *Avena*, 2004 I. C. J. 12; *LaGrand*, 2001 I. C. J. 466. That conclusion, as an "interpretation of an international agreement by an international court" deserves our "'respectful consideration.'" *Ante*, at 355 (opinion of the Court). That "respectful consideration," for reasons I shall explain, see *infra*, at 382–385, counsels in favor of an interpretation that is consistent with the ICJ's reading of the Convention here.

The Government says to the contrary that Article 36 is "addressed solely to the rights of States and not private individuals"; hence, a foreign national may not claim in an American court that a State has convicted him without the consular notification that Article 36 requires. Brief for United States as *Amicus Curiae* 7. But its arguments are not persuasive. The Government rests this conclusion primarily upon its claim that there is a "long-established presumption that treaties and other international agreements do not create judicially enforceable individual rights." *Id.*, at 11.

The problem with that argument is that no such presumption exists. The Government cites three cases in support of

its position, *Charlton* v. *Kelly*, 229 U. S. 447, 474 (1913); *Whitney* v. *Robertson*, 124 U. S. 190, 195 (1888); and *Foster*, 2 Pet., at 306–307. The first of these, *Charlton*, says that the question whether a treaty has been abrogated by another nation's violations is a matter with which "'judicial tribunals have nothing to do.'" 229 U. S., at 474. The second, *Whitney*, says that whether a subsequent federal statute that abrogates a treaty violates the United States' treaty obligations is a matter that has "not been confided to the judiciary." 124 U. S., at 195. The third, *Foster*, says that in "a controversy between two nations concerning national boundary, it is scarcely possible that the Courts of either should refuse to abide by the measures adopted by its own government." 2 Pet., at 306–307. What have these issues to do with the present one? How do these cases support the presumption that the Government claims?

Regardless, as I have just said, see *supra*, at 373, the *Head Money Cases* make clear that a treaty may confer certain enforceable "rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other." 112 U. S., at 598; see also 2 Restatement (Third) on Foreign Relations Law of the United States § 907 (1986) (hereinafter Restatement) ("A private person having rights against the United States under an international agreement may assert those rights in courts in the United States"). And the language of the Convention makes clear that it is such a treaty. Indeed, to my knowledge no other nation's courts (or perhaps no more than one) have held to the contrary. The cases cited by the respondents and the Government do not say otherwise. See Judgment of Nov. 7, 2001, 5 BGHSt 116 (Germany) (deciding in light of *LaGrand* that the Convention creates individual rights, but declining to suppress confession); *Queen* v. *Abbrederis* (1981) 51 F. L. R. 99, 115 (Ct. Crim. App. New South Wales (Australia)) (deciding that Convention does not "affect the carrying out of an investigation by interrogation of a foreign person coming to this country").

But see *Queen* v. *Van Bergen*, [2000] 261 A. R. 387, 390 (Ct. App. Alberta (Canada)) (noting *in dictum* that the Convention "creates an obligation between states and is not one owed to the national," but affirming denial of suppression motion on the ground that "there was in any event no proven prejudice to" the defendant). See also *Queen* v. *Partak*, [2001] 160 C. C. C. 3d 553 (Ont. Super. Ct. of J.) (applying *Van Bergen*'s "serious prejudice" test to conclude that the defendant's statements were admissible); compare cases cited *infra*, at 394–395.

The Government also points out that the Executive Branch's interpretation of treaty provisions is entitled to "great weight." *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 184, 185 (1982). I agree with this presumption. But the Executive's views on our treaty obligations are "not conclusive." *Id.*, at 184; see *Perkins* v. *Elg*, 307 U. S. 325, 328, 337–342 (1939) (declining to adopt Executive's treaty interpretation); *Johnson* v. *Browne*, 205 U. S. 309, 319–321 (1907) (same); *De Lima* v. *Bidwell*, 182 U. S. 1, 181, 194–199 (1901) (same). Where language, the nature of the right, and the ICJ's interpretation of the treaty taken separately or together so strongly point to an intent to confer enforceable rights upon an individual, I cannot find in the simple fact of the Executive Branch's contrary view sufficient reason to adopt the Government's interpretation of the Convention.

Accordingly, I would allow the petitioners to raise their claims based on violations of the Convention in their respective state-court proceedings.

III

The more difficult issue, I believe, concerns the nature of the Convention's requirements as to remedy. In particular, Bustillo's case concerns a state procedural default rule. When, if ever, does the Convention require a state court to set aside such a rule in order to hear a criminal defendant's

claim that the police did not "inform" him of his "right" to communicate with his "consular post"? Art. 36(1)(b), 21 U. S. T., at 101. The Court says that the answer is "never." See *ante*, at 350–360. In its view, the Convention does not under any circumstances trump a State's ordinary procedural rules requiring a defendant to assert his claims at trial or lose them forever.

In my view, Article 36 of the Convention requires a less absolute answer. Article 36 says that the rights it sets forth "shall be exercised in conformity with the laws and regulations of the receiving State," but it instantly adds, "subject to the proviso . . . that the said laws and regulations must enable *full effect* to be given to the purposes for which the [Article 36] rights are . . . intended." Art. 36(2), 21 U. S. T., at 101 (emphasis added). The proviso means that a State's ordinary procedural default rules apply *unless* (1) the defendant's failure to raise a Convention matter (*e. g.*, that police failed to inform him of his Article 36 rights) can itself be traced to the failure of the police (or other governmental authorities) to inform the defendant of those Convention rights, *and* (2) state law does not provide any other effective way for the defendant to raise that issue (say, through a claim of ineffective assistance of counsel).

Several considerations lead to this conclusion. First, as I have just noted, Article 36 says both that its rights "shall be exercised in conformity with" the host country's "laws and regulations" and that those "laws and regulations must enable full effect to be given" to the purposes for which those rights "are intended." This interpretation makes *both* the "conformity" requirement and the "full effect" requirement meaningful.

Second, the Convention's drafting history supports this interpretation. The first draft of the Vienna Convention was written by the International Law Commission. Article 36(2) of that draft required only that domestic laws "not nullify" the rights afforded by the Convention. Draft Articles

on Consular Relations Adopted by the International Law Commission at its Thirteenth Session, Art. 36(2), reprinted in L. Lee, Vienna Convention on Consular Relations 237 (1966). A later amendment substituted the "full effect" phrase over the strenuous objection of several negotiating countries whose delegates argued that the phrase would "modify the criminal laws and regulations or the criminal procedure of the receiving State." 1 United Nations Conference on Consular Relations, Official Records, Summary records of plenary meetings and of the meetings of the First and Second Committees, U. N. Doc. A/CONF.25/16, ¶ 26, p. 38 (1963) (statement of Romania). See also *id.*, ¶ 30, at 38–39 (statement of Congo, Leopoldville) (amendment "implied the revision of certain laws or regulations, which it would be difficult to carry out in practice"); *id.*, 12th mtg., ¶ 4, at 40 (statement of Union of Soviet Socialist Republics) (rejecting the amendment because it would "force [signatories] to alter their criminal laws and regulations"); *id.*, 20th mtg., ¶ 81, at 84 (statement of Romania) (same); *id.*, ¶ 95, at 86 (statement of Czechoslovakia) (same).

Based on this objection, the Soviet Union proposed reverting to the original language. The United Kingdom opposed that measure, explaining that it supported the "full effect" version because the initial ("not nullify") version

> "meant that the laws and regulations of the receiving State would govern the rights specified . . . provided that they did not render those rights completely inoperative—for 'to nullify' meant to 'render completely inoperative'. But rights could be seriously impaired without becoming completely inoperative. . . . Consular officials should, of course, comply with the laws and regulations of the receiving State in such matters as the times for visiting prisoners, but it was most important that the substance of the rights and obligations specified . . . should be preserved." *Id.*, ¶¶ 6–7, at 40.

No one disagreed with the United Kingdom's understanding of the words "full effect." And with that understanding, the delegates voted down the Soviet Union's proposal to revert to the original language, and ultimately adopted the provision with the words "full effect." *Id.*, ¶ 109, at 87. As so enacted, the provision reflects the "essential principle of international law . . . 'that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.'" 2 Restatement § 901, at 343.

Third, the decisions of the ICJ, fairly read, interpret the Convention similarly. In *LaGrand* and *Avena*, the ICJ read the Convention as authorizing an individual foreign national to raise an Article 36 violation at trial or in a postconviction proceeding. See *Avena*, 2004 I. C. J., at 59–60, ¶ 121; *LaGrand*, 2001 I. C. J., at 513–514, ¶ 125. The ICJ added that the Convention requires member states to provide "effective" remedies in their courts for Convention violations. See *Avena*, *supra*, at 65, ¶ 138. And the ICJ made two critical statements in respect to procedural default rules. In *LaGrand*, the court said that in "itself, the [procedural default] rule does *not* violate Article 36 of the Vienna Convention." 2001 I. C. J., at 497, ¶ 90 (emphasis added). Rather, the "problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming . . . that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay.'" *Ibid.* And the ICJ later specified that the Convention forbids American States to apply a procedural default rule to bar assertion of a Convention violation claim "*where it has been the failure of the United States [or of a State] itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial.*" *Avena*, 2004 I. C. J., at 57, ¶ 113 (emphasis added).

This last statement indicates that the ICJ understood the Convention to prevent application of a procedural default rule only where the arresting authorities' failure to inform the foreign national of his Convention rights brought about the procedural default in the first place. Taken together, the above statements make clear that the ICJ read the Convention simply to require an effective remedy. It stated repeatedly that it did not dictate what that remedy would be, as long as it was offered as part of the "judicial process." *Id.*, at 65–66, ¶¶140–141. Hence, if the State provides *some other effective remedy*, for example, review for prejudice through a claim of ineffective assistance of counsel, then the Convention would not forbid application of ordinary procedural default rules. See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.6 (rev. ed. Feb. 2003) (discussing defense counsel's obligation to seek consular assistance); *Valdez* v. *State*, 46 P. 3d 703, 710 (Okla. Crim. App. 2002) (granting postconviction relief to a defendant who had failed to raise a Vienna Convention violation at trial, because he showed that his lawyer "could have obtained financial, legal and investigative assistance from his consulate" that would have produced important new evidence); see also *Ledezma* v. *State*, 626 N. W. 2d 134, 152 (Iowa 2001) (concluding that "all criminal defense attorneys representing foreign nationals should be aware of the right to consular access as provided by Article 36, and should advise their clients of this right" because local counsel "are not equipped to provide the same services as the local consulate"); cf. *Rompilla* v. *Beard*, 545 U. S. 374 (2005).

I will assume that the ICJ's interpretation does not bind this Court in this case. Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T. S. No. 993 (1945) (ICJ decisions have "binding force" only "between the parties and in respect of that particular case"). But as the majority points out, the ICJ's decisions on this issue nonetheless warrant our "'respectful consideration.'" *Ante*, at 355. That

"respectful consideration" reflects the understanding that uniformity is an important goal of treaty interpretation. See *Olympic Airways* v. *Husain*, 540 U. S. 644, 660 (2004) (SCALIA, J., dissenting) ("[I]t is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently"). And the ICJ's position as an international court specifically charged with the duty to interpret numerous international treaties (including the Convention) provides a natural point of reference for national courts seeking that uniformity. See Counter-Memorial of the United States in *Avena*, 2004 I. C. J. No. 128, p. 61, n. 128 (Nov. 3, 2003) (even if ICJ decision binds only in particular case, "it is well-settled" that an ICJ decision "may serve as authority beyond a particular case"; citing authorities); Ordonez & Reilly, Effect of the Jurisprudence of the International Court of Justice on National Courts, in International Law Decisions in National Courts 335, 365 (T. Franck & G. Fox eds. 1996) (noting that ICJ cases interpreting treaties "are routinely cited by domestic judges" in many countries "as evidence of international law").

That "respectful consideration" also reflects an understanding of the ICJ's expertise in matters of treaty interpretation, a branch of international law. The ICJ's opinions "are persuasive evidence" of what "[international] law is." 1 Restatement § 103, at 37, Comment *b;* see also Morrison, Treaties as a Source of Jurisdiction, Especially in U. S. Practice, in The International Court of Justice at a Crossroads 58, 61 (L. Damrosch ed. 1987); *The Paquete Habana*, 175 U. S. 677, 700 (1900) ("[T]rustworthy evidence of what [international] law really is" can be found in "the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat"); L. Henkin, R. Pugh, O. Schachter, & H. Smit, International Law: Cases and Materials 120 (3d ed. 1993) ("[T]he decisions of the [ICJ] are, on

the whole, regarded by international lawyers as highly persuasive authority of existing international law").

Thus, this Court has repeatedly looked to the ICJ for guidance in interpreting treaties and in other matters of international law. See, *e. g.*, *United States* v. *Maine*, 475 U. S. 89, 99–100 (1986) (referring to the *Fisheries Case (United Kingdom* v. *Norway)*, 1951 I. C. J. 116 (Judgment of Dec. 18), as legal authority in a maritime boundary dispute); *United States* v. *Louisiana*, 470 U. S. 93, 107 (1985) (same); *United States* v. *Louisiana*, 394 U. S. 11, 69–72 (1969) (same); *First Nat. City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U. S. 611, 628–629, and n. 20 (1983) (citing *Case Concerning The Barcelona Traction, Light & Power Co.*, 1970 I. C. J. 3 (Judgment of Feb. 5), for the proposition that an incorporated entity "is not to be regarded as legally separate from its owners in all circumstances"); *United States* v. *California*, 381 U. S. 139, 172 (1965) (citing the *Corfu Channel Case*, 1949 I. C. J. Rep. 4 (Judgment of Apr. 9), in boundary dispute); *Reid* v. *Covert*, 354 U. S. 1, 61 (1957) (Frankfurter, J., concurring in result) (citing *France* v. *United States*, 1952 I. C. J. Rep. 176 (Judgment of Aug. 27), as authority for the meaning of the word "'disputes'" in international treaties).

The lower courts have done the same. See, *e. g.*, *McKesson Corp.* v. *Islamic Republic of Iran*, 52 F. 3d 346, 352 (CADC 1995); *Princz* v. *Federal Republic of Germany*, 26 F. 3d 1166, 1180, 1184 (CADC 1994) (Wald, J., dissenting); *Siderman de Blake* v. *Republic of Argentina*, 965 F. 2d 699, 715 (CA9 1992); *Committee of United States Citizens Living in Nicaragua* v. *Reagan*, 859 F. 2d 929, 932, 935 (CADC 1988); *Arcoren* v. *Peters*, 811 F. 2d 392, 397, n. 11 (CA8 1987); *Conservation Law Foundation of New England* v. *Secretary of Interior*, 790 F. 2d 965, 967 (CA1 1986); *Persinger* v. *Islamic Republic of Iran*, 729 F. 2d 835, 837, 843 (CADC 1984); *McKeel* v. *Islamic Republic of Iran*, 722 F. 2d 582, 585 (CA9 1983); *Cruz* v. *Zapata Ocean Resources, Inc.*, 695 F. 2d

428, 433, and nn. 8–9 (CA9 1982); *Spiess* v. *C. Itoh & Co. (America), Inc.*, 643 F. 2d 353, 365 (CA5 1981) (Reavley, J., dissenting); *Agee* v. *Muskie*, 629 F. 2d 80, 90 (CADC 1980) (MacKinnon, J., dissenting); *Sadat* v. *Mertes*, 615 F. 2d 1176, 1187–1188, n. 14 (CA7 1980) *(per curiam)*; *Narenji* v. *Civiletti*, 617 F. 2d 745, 748 (CADC 1979); *United States* v. *Postal*, 589 F. 2d 862, 869 (CA5 1979); *McComish* v. *Commissioner*, 580 F. 2d 1323, 1329 (CA9 1978); *Diggs* v. *Richardson*, 555 F. 2d 848, 849 (CADC 1976); *Island Airlines, Inc.* v. *CAB*, 352 F. 2d 735, 741 (CA9 1965); *Rogers* v. *Societe Internationale Pour Participations Industrielles et Commerciales, S. A.*, 278 F. 2d 268, 273, n. 3 (CADC 1960) (Fahy, J., dissenting); *Greenpeace, Inc.* v. *France*, 946 F. Supp. 773, 783 (CD Cal. 1996); *Looper* v. *Morgan*, Civ. A. No. H–92–0294, 1995 WL 499816, *1 (SD Tex., June 23, 1995); *Koru North America* v. *United States*, 701 F. Supp. 229, 232 (CIT 1988); *United States* v. *Central Corp. of Ill.*, No. 87 C 5072, 1987 WL 20129 (ND Ill., Nov. 13, 1987); *United States* v. *Palestine Liberation Organization*, 695 F. Supp. 1456, 1461–1462, 1467 (SDNY 1988); *Morgan Guaranty Trust Company of N. Y.* v. *Republic of Palau*, 639 F. Supp. 706, 715 (SDNY 1986); *Massachusetts* v. *Clark*, 594 F. Supp. 1373, 1387–1388, n. 8 (Mass. 1984); *United States-South West Africa/Namibia Trade & Cultural Council* v. *Department of State*, 90 F. R. D. 695, 696, n. 2 (DC 1981); *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1187 (ED Pa. 1980); *Rodriguez Fernandez* v. *Wilkinson*, 505 F. Supp. 787, 797 (Kan. 1980); *In re Alien Children Ed. Litigation*, 501 F. Supp. 544, 591 (SD Tex. 1980); *American Int'l Group, Inc.* v. *Islamic Republic of Iran*, 493 F. Supp. 522, 525 (DC 1980); *National Airmotive* v. *Government and State of Iran*, 491 F. Supp. 555, 556 (DC 1980); *CAB* v. *Island Airlines, Inc.*, 235 F. Supp. 990, 1003–1004, and nn. 23–24, 1005, and n. 27 (Haw. 1964); *United States* v. *Melekh*, 190 F. Supp. 67, 81, 89 (SDNY 1960); *Balfour, Guthrie & Co.* v. *United States*, 90 F. Supp. 831, 834, n. 1 (ND Cal. 1950).

Today's decision interprets an international treaty in a manner that conflicts not only with the treaty's language and history, but also with the ICJ's interpretation of the same treaty provision. In creating this last mentioned conflict, as far as I can tell, the Court's decision is unprecedented.

The Court supports its interpretation in three basic ways. First, the majority says that "respectful consideration" does not require us to agree with a decision that is clearly wrong. And, it says, the ICJ's decision is clearly wrong. The ICJ's interpretation of Article 36, the majority says, would permit a Convention violation claim to "trump not only procedural default rules, but any number of other rules requiring parties to present their legal claims at the appropriate time for adjudication." *Ante*, at 357. That interpretation, it adds, "overlooks the importance of procedural default rules in an adversary system," and is "inconsistent with the basic framework" of that "system." *Ante*, at 356–357.

The majority's argument, however, overlooks what the ICJ actually said, overstates what it actually meant, and is inconsistent with what it actually did. In *Avena* and *LaGrand*, the ICJ did not say that the Convention necessarily trumps any, let alone all, procedural rules that would otherwise bar assertion of a Convention violation claim. Nor did it say that the Convention necessarily trumps all procedural default rules. Rather, it said that the Convention prohibits application of those rules to a Convention violation claim only "where it has been the *failure* of the United States [or of a State] itself *to inform* that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial." *Avena*, 2004 I. C. J., at 57, ¶ 113 (emphasis added). Thus, Article 36(2) precludes procedural default only *where the defendant's failure to bring his claim sooner is the result of the underlying violation.* Since procedural default rules themselves typically excuse defaults where a defendant shows "cause and prejudice," it is difficult to see how this statement "overlooks

the importance of procedural default rules in an adversary system," or is "inconsistent with the basic framework" of that "system."

Moreover, *Avena* and *LaGrand* make clear what the ICJ's language taken in context means: The Convention requires effective national remedies; hence local procedural rules must give way (to the Convention's "full effect" requirement) when, but only when, it is the failure of the arresting authorities to inform the defendant of his Convention rights that prevented the defendant from bringing his claim sooner. The opinions nowhere suggest that a State must provide a procedural remedy to a defendant who, for example, sleeps on his rights.

Consider, too, what the ICJ did in *Avena*, a case that clarified the court's earlier *LaGrand* opinion. It did not hold that American courts must ignore their procedural default rules in each of the 54 individual cases at issue. Rather, it held that domestic courts must provide "review and reconsideration" in each case. *Avena*, 2004 I. C. J., at 72, ¶ 153(9). It nowhere forbids a state court conducting such a "review" to bar claims not timely made provided that the violation did not itself cause the delay. See *id.*, at 65, ¶ 139.

Perhaps the ICJ's opinions are open to different interpretations. But how does reading those opinions as creating an extreme rule of law, as reflecting a lack of understanding of the "adversary system," show "respectful consideration"? To show that kind of respect, we must read the opinions in light of the Convention's underlying language and purposes and ask whether, or to what extent, they require modification of a State's ordinary procedural rules. See Art. 36(2), 21 U. S. T., at 101 (laws and regulations "must enable full effect to be given *to the purposes* for which the rights accorded under this Article are intended" (emphasis added)).

Nothing in *Avena* suggests, for example, that an arrested foreign national who was already aware of his rights under Article 36, or who had a lawyer who was aware of those

rights, necessarily would be entitled to an exemption from the State's procedural default rules under Article 36(2). Instead, as I have explained, see *supra*, at 381–382, 387, *Avena* says only that Article 36(2) requires a state court to excuse a procedural default rule where the State failed to inform the defendant of his consular access rights, *and* the defendant was not aware of those rights, *and* the State is unwilling to provide some other effective remedy, for example (if the lawyer acts incompetently in respect to Convention rights of which the lawyer was aware) an ineffective-assistance-of-counsel claim. The Court's reluctance to give *LaGrand* and *Avena* this perfectly reasonable interpretation reflects a failure to provide in practice the "respectful consideration" that we all believe the law demands.

The Court also relies on *Breard* v. *Greene*, 523 U. S. 371 (1998) *(per curiam)*. In that case, a foreign national, claiming a Convention violation, sought federal habeas corpus. This Court upheld a denial of relief on the ground that the lower courts had correctly found that Breard procedurally defaulted his Convention violation claim by failing to timely raise it in his state-court proceedings. In reaching its conclusion, the Court rejected Breard's claim that the Convention trumped the procedural default rule. Its reasons were (1) that "it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State," *id.*, at 375; (2) that this principle is "embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention 'shall be exercised in conformity with the laws and regulations of the receiving State,'" *ibid.;* and (3) that the federal procedural default rule, as a later-in-time federal statute, superseded any inconsistent provision in the Convention, *id.*, at 376.

I do not believe that *Breard* controls the outcome of these cases. With respect to the third ground for the Court's deci-

sion, *Breard* concerned a *federal*, rather than (as in Bustillo's case) a *state*, procedural default rule. Those different kinds of rules are treated differently under the Supremacy Clause. See *ibid.* (applying the rule that "'an Act of Congress . . . is on a full parity with a treaty, and . . . when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null'"). Contrary to JUSTICE GINSBURG's view, then, *ante*, at 363 (opinion concurring in judgment), there is no anomaly in treating state law differently from federal law for these purposes, if Congress chooses to enact legislation binding only the Federal Government in respect to a matter covered by a treaty that binds both the Federal Government and the States. Therefore, reading the Convention to require the state courts to set aside Virginia's procedural default rule in Bustillo's case (assuming for argument's sake that his case meets the criteria I have described, see *supra*, at 379) would not call into question, let alone overrule, "*Breard*'s plain holding that the Convention does not trump the *[federal]* procedural default doctrine," *ante*, at 353, n. 4 (opinion of the Court), even if that ruling on its own terms is still good law after *Avena* and *LaGrand*.

Moreover, the ICJ decided *Avena* and *LaGrand* after this Court decided *Breard*. And it is not difficult to reconcile those cases with *Breard* because they do not directly conflict with *Breard*'s result. Rather, they interpret Article 36(2) to require state procedural default rules *sometimes* to give way to the Convention, namely, when those rules prevent effective remedy by barring assertion of a claim because of a delay caused by the Convention violation itself. I would read *Breard* as consistent with this interpretation, *i. e.*, as not saying that the Convention *never* trumps any procedural default rule.

The Court complains that this treatment of *Breard* fails to give our own opinions "'respectful consideration.'" *Ante*, at 353, n. 4. In fact, our opinions are entitled to far more

than respectful consideration; they are entitled to full *stare decisis* effect. But, as I have explained, reading *Breard* not to decide the outcome in this case would neither overrule *Breard*'s holding, nor reject outright its reading of the Convention. And, in any event, as a matter of the law of *stare decisis*, a modified reading of *Breard* is appropriate in light of the fact that the ICJ's later decisions amount to a "significant . . . subsequent development" of the law sufficient to lead to a reconsideration of past precedent. *Agostini* v. *Felton*, 521 U. S. 203, 236 (1997); *United States* v. *Percheman*, 7 Pet. 51 (1833) (revisiting prior treaty interpretation when new international law has come to light); see also *Medellín*, 544 U. S., at 689 (O'Connor, J., dissenting) ("In the past the Court has revisited its interpretation of a treaty when new international law has come to light" (citing *Percheman*, *supra*, at 89)). Indeed, the Court seems to recognize as much, in that it spends several pages explaining why the ICJ's interpretation of the Convention is incorrect, see *ante*, at 356–357, rather than simply rejecting Bustillo's argument on the ground that "'respectful consideration' of precedent should begin at home," *ante*, at 353, n. 4.

And there are other reasons not to place too much reliance on the breadth of *Breard*'s language. *Breard* is a *per curiam* decision that the Court had to reach within the few hours available between the time a petition for certiorari was filed and a scheduled execution, the decision is fairly recent, and the modification to which I refer requires no more than reading an exception into *Breard*'s language, language that in any event was not central to the Court's holding.

The modification is appropriate too because the "full effect" proviso in Article 36(2) provides a "clear and express statement" that sometimes the Convention might trump a domestic procedural rule. And in any event, it is not even clear that such a clear statement rule actually exists. *Breard*'s statement of a presumption that only a treaty pro-

vision with a "clear and express statement" can trump "the procedural rules of the forum State," 523 U. S., at 375, is in tension with more fundamental interpretive rules in this area. See, *e. g.*, *Jordan* v. *Tashiro*, 278 U. S. 123, 127 (1928) (treaties must be construed liberally to protect substantial rights); *Asakura*, 265 U. S., at 342 (same); see also Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, Art. 27, 1115 U. N. T. S. 331, T. S. No. 58 (1980), 8 I. L. M. 679 (1969) (treaty parties may not invoke domestic law as an excuse for failing to conform to their treaty obligations).

Indeed, the cases *Breard* cites for the proposition that a clear and express statement is required to trump a domestic procedural rule seem not to establish it. *Sun Oil Co.* v. *Wortman*, 486 U. S. 717, 723 (1988) (Court said only that it was a "rule in international law at the time the Constitution was adopted" that procedural rules "may be governed by forum law even when the substance of the claim must be governed by another State's law"; case involved domestic law and the Constitution's Full Faith and Credit Clause); *Le Roy* v. *Crowninshield*, 15 F. Cas. 362, 365, 371 (No. 8,269) (Mass. 1820) (case involved conflict of laws, not an international treaty); *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U. S. 694, 700 (1988) (case said that "we almost necessarily must refer to the internal law of the forum state" to find a service of process standard if a treaty "does not prescribe" it); *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 539–540, and n. 25 (1987) (case involving a specific treaty, not a general interpretive standard).

Finally, the Court says it would be odd to treat Convention rights more favorably than rights protected by the U. S. Constitution. *Ante*, at 358–360. But "[a] treaty is in its nature a contract between two nations," *Foster*, 2 Pet., at 314, and nations are of course free to agree to grant one another's

citizens protections that differ from the protections enjoyed by citizens at home, particularly when circumstances call for differential treatment. See *infra*, at 394.

In sum, I find strong reasons for interpreting the Convention as sometimes prohibiting a state court from applying its ordinarily procedural default rule to a Convention violation claim. The fact that the ICJ reached a similar conclusion in *LaGrand* and *Avena* adds strength to those reasons. And I cannot agree with the majority's arguments to the contrary.

Consequently, I would remand No. 05–51 so that Bustillo can argue to the Virginia state courts that they should modify their ordinary procedural default requirements. I would leave it to the state courts to determine in the first instance whether state law has provided Bustillo the effective remedy that the Convention requires and how it has done so (whether through "cause and prejudice" exceptions, ineffective-assistance-of-counsel claims, or other ways). Cf. *LaGrand*, 2001 I. C. J., at 513, ¶ 125 (the "choice of [implementing] means must be left to the United States").

IV

The final question presented asks whether a Convention violation "result[s] in the suppression" of the evidence, say, a confession, that a foreign national provided police before being informed of his Convention rights. Pet. for Cert. in No. 04–10566, p. i. The majority answers in absolute terms, stating that "suppression is not an appropriate remedy for a violation of [the Convention]." See *ante*, at 337. I agree with the majority insofar as it rejects the argument that the Convention creates a *Miranda*-style "automatic exclusionary rule." *Ante*, at 344; see also *Miranda*, 384 U. S., at 471; cf., *e. g.*, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Franks* v. *Delaware*, 438 U. S. 154 (1978). But I do not agree with the absolute nature of its statement. Rather, *sometimes* suppression could prove the only effective remedy. And, if that is so, then the Convention, which insists upon effective remedies,

would require suppression in an appropriate case. Art. 36(2), 21 U. S. T., at 101.

Much depends upon the circumstances. It may be true that in "most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police." *Ante*, at 349. *Miranda* surely helps, for it guarantees that police will inform an arrested foreign national of his right to contact a lawyer. But one cannot guarantee in advance that *Miranda* will adequately cure *every* seriously prejudicial failure to inform an arrested person of his right to contact his consular post. One can imagine a case, for example, involving a foreign national who speaks little English, who comes from a country where confessions made to the police cannot be used in court as evidence, who does not understand that a state-provided lawyer can provide him crucial assistance in an interrogation, and whose native community has great fear of police abuse. Indeed, Sanchez-Llamas made allegations similar to these in his case. Brief for Petitioner Sanchez-Llamas 5–7; see also Brief for the Government of the United Mexican States as *Amicus Curiae* 10.

While JUSTICE GINSBURG is correct that a defendant who is prejudiced under the Convention may be able to show that his confession is involuntary under *Miranda*, *ante*, at 361, I am not persuaded that this will always be so. A person who fully understands his *Miranda* rights but does not fully understand the implications of these rights for our legal system may or may not be able to show that his confession was involuntary under *Miranda*, but he will certainly have a claim under the Vienna Convention. In such a case, suppression of a confession may prove the only effective remedy. I would not rule out the existence of such cases in advance.

Furthermore, the majority is wrong to say that it would "be startling if the Convention were read to require suppression" in such cases because suppression "is an entirely American legal creation." *Ante*, at 343. I put to the side the fact

that "suppression" is in origin a British, not an American, remedy. See *Dickerson* v. *United States*, 530 U. S. 428, 433 (2000) (noting that "[t]he roots of the *[Miranda]* test developed in the common law" and citing English cases); see also *King* v. *Warickshall*, 1 Leach 263, 263–264, 168 Eng. Rep. 234, 235 (1783) (coerced confessions are inadmissible in British courts). Regardless, it is not "startling" to read the Convention as *sometimes* requiring suppression. That is because those who wrote the Convention were fully aware that the criminal justice systems of different nations differ in important ways. They did not list particular remedies. They used general language. That language requires every member nation to give "full effect" to Article 36(1)'s "purposes." Art. 36(2), 21 U. S. T., at 101. That language leaves it up to each nation to determine how to implement Article 36(1)'s requirements. *Avena*, 2004 I. C. J., at 61, ¶ 127; *LaGrand*, *supra*, at 513–514, ¶ 125. But as a matter of logic and purpose that language must also insist upon the use of suppression if and when there are circumstances in which suppression provides the only *effective remedy*.

These differences may also help to explain what the majority says is the disturbing circumstance that "nearly all" other signatories to the Convention "refuse to recognize" suppression "as a matter of domestic law," and therefore that "Sanchez-Llamas would [not] be afforded the relief he seeks here in any of the other 169 countries party to the Vienna Convention." *Ante*, at 344. In fact, there are several cases from common-law jurisdictions suggesting that suppression is an appropriate remedy for a Convention violation. See, *e. g.*, *Tan Seng Kiah* v. *Queen* (2001) 160 F. L. R. 26 (Crim. App. N. Terr.) (Australian case suppressing confession obtained in violation of statute requiring police to notify defendant of right to contact consulate upon arrest); *Queen* v. *Tan* [2001] W. A. S. C. 275 (Sup. Ct. W. Aus. in Crim.) (Australian case considering but declining to suppress evidence based on violation of same statute); *Queen* v. *Partak*, 160

C. C. C. 3d, at ¶ 63 (Canada) (concluding that suppression is inappropriate, not because it was never a proper remedy under the Vienna Convention but because the defendant "completely failed to demonstrate any prejudice arising from the failure of the police to notify him of his consular rights").

I concede the absence of such cases from civil-law jurisdictions. But the criminal justice systems in those nations differ from our own in significant ways. Civil-law nations, for example, typically rely more heavily than do we upon judicial investigation, questioning by a neutral magistrate, the compiling of all evidence into a dossier, and later review of that dossier at trial by judges who may sit without our type of jury. In such a system, formal suppression proceedings may prove less frequent. Judges, as a matter of practice, may simply disregard improperly obtained evidence, they may discount the significance of that evidence, or they may adjust the nature of future proceedings or even the final sentence accordingly. See Damaška, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 U. Pa. L. Rev. 506, 522 (1972) (explaining why many civil law system "provisions regulating the interrogation of defendants are silent as to the admissibility of testimony obtained in violation of proper interrogation procedures"); see also Van Kessel, European Perspectives on the Accused as a Source of Testimonial Evidence, 100 W. Va. L. Rev. 799, 831 (1997) ("Because [civil-law] courts decide both questions of law and of fact, exclusionary rules in [those] courts are more appropriately described as rules of decision than rules of exclusion—what evidence the fact-finder may use to support its decision, rather than what evidence may be presented to the fact-finder. The presiding judge is well acquainted with all evidence in the dossier and often must 'put aside' or 'forget about' evidence which legally cannot be used to support the judgment"); Bradley, The Exclusionary Rule in Germany, 96 Harv. L. Rev. 1032, 1065 (1982) (noting that in the German inquisitorial system, for

many police violations, "the fact that evidence was legally or illegally obtained is not dispositive"; instead, the "decision to admit or suppress will be determined by balancing the relative importance of the defendant's privacy rights against the seriousness of the offense charged"); Declaration of Professor Thomas Weigend, Annex 3 to Counter-Memorial of the United States, in *Avena*, 2004 I. C. J. No. 128, p. A367, ¶ 20 (Oct. 22, 2003) (noting that in the German and Dutch legal systems, a procedural violation can lead to a reduced sentence).

Thus, the *absence* of reported decisions formally suppressing confessions obtained in violation of the Convention tells us nothing at all about whether such nations give "full effect" to the "purposes" of Article 36(1). The existence of cases in such nations where a court denies a defense request to suppress, of course, might well shed light on that nation's readiness to provide an effective remedy. The Solicitor General cites one (and only one) such case. See Judgment of Nov. 7, 2001, 5 BGHSt 116 (deciding in light of *LaGrand* that the Convention creates individual rights, but declining to suppress confession). That is the only support I have found for the claim that somehow the petitioners here are asking the United States to provide that which other countries deny, an effective remedy.

V

The United States joined the Vienna Convention, and urged other nations to join, in order to promote "the orderly and effective conduct of consular relations between States," and to guarantee "the protection of our citizens abroad." Vienna Convention on Consular Relations with Optional Protocol, S. Exec. Doc. No. E, 91st Cong., 1st Sess., 60, 75 (1969). In doing so, the United States, along with the other 169 nations that ratified the Convention, undertook a complex task. They sought not only to protect their consular posts, but also to assure that their nationals would have access to those posts when arrested abroad. But how to enforce those

rights poses a difficult question because the enforcement mechanism inevitably will vary depending upon the details of a nation's legal system. For practical, legal, and political reasons, it is difficult to write enforcement details into an international treaty. Yet without any such guarantees it may prove difficult to prevent an individual nation, through application of its system's details, from denying in practice the rights that the treaty sought to assure.

The Convention deals with this problem by including a general provision that *both* severely limits the treaty's intrusion into the functioning of a domestic legal system *and also* safeguards consular access rights from serious domestic neglect. It does so by stating that those rights shall "be exercised in conformity with the laws and regulations of the receiving State," *provided that* those laws and regulations give "full effect" to Article 36(1)'s purposes. Art. 36(2), 21 U. S. T., at 101.

Applying this provision to our own legal system, I would seek to minimize the Convention's intrusion and federal intrusion into the workings of state legal systems while simultaneously keeping faith with the Convention's basic objectives. That is why I believe that the Convention here requires individual States to make an exception (akin to a "cause and prejudice" exception) to a state procedural default rule if (1) the defendant's failure to raise a claim of a Convention violation in a timely manner itself was a product of that violation, and (2) state law provides no other procedural means through which the State's courts can provide "review," "reconsideration," and effective relief. Similarly, I would hold that whether the Convention requires a state court to suppress a confession obtained after an Article 36 violation depends on whether suppression is the only remedy available that will effectively cure related prejudice. And because neither state court applied this standard below, I would remand each case for that initial consideration. See 338 Ore., at 269, 108 P. 3d, at 574 (rejecting Sanchez-Llamas'

request for suppression remedy solely on the ground that the Convention "does not create rights that individual foreign nationals may assert in a criminal proceeding"); App. to Pet. for Cert. 47a (rejecting Bustillo's request for state postconviction relief based on a standard different from that set forth here).

The interpretation of the Convention that I would adopt is consistent with the ICJ's own interpretation and should not impose significant new burdens upon state criminal justice systems. America's legal traditions have long included detailed rules for discovering and curing prejudicial legal errors. Indeed, many States already have "cause and prejudice" exceptions likely broad enough to provide the "effective" relief the Convention demands. And, in any event, it leaves the States free to apply their own judicial remedies in light of, and bounded by, the Convention's general instructions.

The Court, I fear, does not rise to the interpretive challenge. Rather than seek to apply Article 36's language and purposes to the federal-state relationships that characterize America's legal system, it simply rejects the notion that Article 36(2) sets forth any relevant requirement. That approach leaves States free to deny effective relief for Convention violations, despite America's promise to provide just such relief. That approach risks weakening respect abroad for the rights of foreign nationals, a respect that America, in 1969, sought to make effective throughout the world. And it increases the difficulties faced by the United States and other nations who would, through binding treaties, strengthen the role that law can play in assuring all citizens, including American citizens, fair treatment throughout the world.

Accordingly, I respectfully dissent.

Syllabus

LEAGUE OF UNITED LATIN AMERICAN CITIZENS ET AL. *v.* PERRY, GOVERNOR OF TEXAS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

No. 05–204. Argued March 1, 2006—Decided June 28, 2006*

The 1990 census resulted in a 3-seat increase over the 27 seats previously allotted the Texas congressional delegation. Although the Democratic Party then controlled 19 of those 27 seats, as well as both state legislative houses and the governorship, change was in the air: The Republican Party had received 47% of the 1990 statewide vote, while the Democrats had received only 51%. Faced with a possible Republican ascent to majority status, the legislature drew a congressional redistricting plan that favored Democratic candidates. The Republicans challenged the 1991 plan as an unconstitutional partisan gerrymander, but to no avail.

The 2000 census authorized two additional seats for the Texas delegation. The Republicans then controlled the governorship and the State Senate, but did not yet control the State House of Representatives. So constituted, the legislature was unable to pass a redistricting scheme, resulting in litigation and the necessity of a court-ordered plan to comply with the U. S. Constitution's one-person, one-vote requirement. Conscious that the primary responsibility for drawing congressional districts lies with the political branches of government, and hesitant to undo the work of one political party for the benefit of another, the three-judge Federal District Court sought to apply only "neutral" redistricting standards when drawing Plan 1151C, including placing the two new seats in high-growth areas, following county and voting precinct lines, and avoiding the pairing of incumbents. Under Plan 1151C, the 2002 congressional elections resulted in a 17-to-15 Democratic majority in the Texas delegation, compared to a 59% to 40% Republican majority in votes for statewide office in 2000, thus leaving the 1991 Democratic gerrymander largely in place.

In 2003, however, Texas Republicans gained control of both houses of the legislature and set out to increase Republican representation in the congressional delegation. After a protracted partisan struggle, the leg-

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*Together with No. 05–254, *Travis County, Texas, et al.* v. *Perry, Governor of Texas, et al.*, No. 05–276, *Jackson et al.* v. *Perry, Governor of Texas, et al.*, and No. 05–439, *GI Forum of Texas et al.* v. *Perry, Governor of Texas, et al.*, also on appeal from the same court.

islature enacted a new congressional districting map, Plan 1374C. In the 2004 congressional elections, Republicans won 21 seats to the Democrats' 11, while also obtaining 58% of the vote in statewide races against the Democrats' 41%. Soon after Plan 1374C was enacted, appellants challenged it in court, alleging a host of constitutional and statutory violations. In 2004 the District Court entered judgment for appellees, but this Court vacated the decision and remanded for consideration in light of *Vieth* v. *Jubelirer*, 541 U. S. 267. On remand, the District Court, believing the scope of its mandate was limited to questions of political gerrymandering, again rejected appellants' claims.

Held: The judgment is affirmed in part, reversed in part, and vacated in part, and the cases are remanded.

399 F. Supp. 2d 756, affirmed in part, reversed in part, vacated in part, and remanded.

JUSTICE KENNEDY delivered the opinion of the Court with respect to Parts II–A and III, concluding:

1. This Court held, in *Davis* v. *Bandemer*, 478 U. S. 109, 118–127, that an equal protection challenge to a political gerrymander presents a justiciable case or controversy, although it could not agree on what substantive standard to apply, compare *id.*, at 127–137, with *id.*, at 161–162. That disagreement persists. The *Vieth* plurality would have held such challenges nonjusticiable political questions, but a majority declined to do so, see 541 U. S., at 306, 317, 343, 355. Justiciability is not revisited here. At issue is whether appellants offer a manageable, reliable measure of fairness for determining whether a partisan gerrymander is unconstitutional. Pp. 413–414.

2. Texas' redrawing of District 23's lines amounts to vote dilution violative of § 2 of the Voting Rights Act of 1965. Pp. 423–443.

(a) Plan 1374C's changes to District 23 served the dual goals of increasing Republican seats and protecting the incumbent Republican against an increasingly powerful Latino population that threatened to oust him, with the additional political nuance that he would be reelected in a district that had a Latino majority as to voting-age population, though not a Latino majority as to citizen voting-age population or an effective Latino voting majority. The District 23 changes required adjustments elsewhere, so the State created new District 25 to avoid retrogression under § 5 of the Act. Pp. 423–425.

(b) A State violates § 2 "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not [as] equally open to . . . members of [a racial group as they are to] other members of the electorate." 42 U. S. C. § 1973(b). *Thornburg* v. *Gingles*, 478 U. S. 30, 50–51, identified three threshold con-

ditions for establishing a §2 violation: (1) the racial group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the group must be "politically cohesive"; and (3) the white majority must "vot[e] sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." The legislative history identifies factors that courts can use, once all three threshold requirements are met, in interpreting §2's "totality of circumstances" standard, including the State's history of voting-related discrimination, the extent to which voting is racially polarized, and the extent to which the State has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group. See *id.*, at 44–45. Another relevant consideration is whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area. *Johnson* v. *De Grandy*, 512 U. S. 997, 1000. The district court's determination whether the §2 requirements are satisfied must be upheld unless clearly erroneous. See *Gingles*, *supra*, at 78–79. Where "the ultimate finding of dilution" is based on "a misreading of the governing law," however, there is reversible error. *De Grandy*, *supra*, at 1022. Pp. 425–427.

(c) Appellants have satisfied all three *Gingles* requirements as to District 23, and the creation of new District 25 does not remedy the problem.

The second and third *Gingles* factors—Latino cohesion, majority bloc voting—are present, given the District Court's finding of racially polarized voting in District 23 and throughout the State. As to the first *Gingles* precondition—that the minority group be large and compact enough to constitute a majority in a single-member district, 478 U. S., at 50—appellants have established that Latinos could have had an opportunity district in District 23 had its lines not been altered and that they do not have one now. They constituted a majority of the citizen voting-age population in District 23 under Plan 1151C. The District Court suggested incorrectly that the district was not a Latino opportunity district in 2002 simply because the incumbent prevailed. The fact that a group does not win elections does not resolve the vote dilution issue. *De Grandy*, 512 U. S., at 1014, n. 11. In old District 23 the increase in Latino voter registration and overall population, the concomitant rise in Latino voting power in each successive election, the near victory of the Latino candidate of choice in 2002, and the resulting threat to the incumbent's continued election were the very reasons the State redrew the district lines. Since the redistricting prevented the immediate success of the emergent Latino majority in District 23, there was a denial of opportunity in the real sense of that term. Plan 1374C's

version of District 23, by contrast, is unquestionably not a Latino opportunity district. That Latinos are now a bare majority of the district's voting-age population is not dispositive, since the relevant numbers must account for citizenship in order to determine the group's opportunity to elect candidates, and Latinos do not now have a citizen voting-age majority in the district.

The State's argument that it met its §2 obligations by creating new District 25 as an offsetting opportunity district is rejected. In a district line-drawing challenge, "the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Id.*, at 1008. The District Court's finding that the current plan contains six Latino opportunity districts and that seven reasonably compact districts, as proposed by appellant GI Forum, could not be drawn was not clearly erroneous. However, the court failed to perform the required compactness inquiry between the number of Latino opportunity districts under the challenger's proposal of reinstating Plan 1151C and the "existing number of reasonably compact districts." *Ibid.* Section 2 does not forbid the creation of a noncompact majority-minority district, *Bush* v. *Vera*, 517 U. S. 952, 999, but such a district cannot remedy a violation elsewhere in the State, see *Shaw* v. *Hunt*, 517 U. S. 899, 916. The lower court recognized there was a 300-mile gap between the two Latino communities in District 25, and a similarly large gap between the needs and interests of the two groups. The court's conclusion that the relative smoothness of the district lines made the district compact, despite this combining of discrete communities of interest, is inapposite because the court analyzed the issue only in the equal protection context, where compactness focuses on the contours of district lines to determine whether race was the predominant factor in drawing those lines. See *Miller* v. *Johnson*, 515 U. S. 900, 916–917. Under §2, by contrast, the injury is vote dilution, so the compactness inquiry considers "the compactness of the minority population, not . . . the compactness of the contested district." *Vera*, 517 U. S., at 997. A district that "reaches out to grab small and apparently isolated minority communities" is not reasonably compact. *Id.*, at 979. The lower court's findings regarding the different characteristics, needs, and interests of the two widely scattered Latino communities in District 23 are well supported and uncontested. The enormous geographical distances separating the two communities, coupled with the disparate needs and interests of these populations—not either factor alone—renders District 25 noncompact for §2 purposes. Therefore, Plan 1374C contains only five reasonably compact Latino opportunity districts, one fewer than Plan 1151C. Pp. 427–435.

Syllabus

(d) The totality of the circumstances demonstrates a §2 violation. The relevant proportionality inquiry, see *De Grandy*, 512 U. S., at 1000, compares the percentage of total districts that are Latino opportunity districts with the Latino share of the citizen voting-age population. The State's contention that proportionality should be decided on a regional basis is rejected in favor of appellants' assertion that their claim requires a statewide analysis because they have alleged statewide vote dilution based on a statewide plan. Looking statewide, there are 32 congressional districts. The five reasonably compact Latino opportunity districts amount to roughly 16% of the total, while Latinos make up 22% of Texas' citizen voting-age population. Latinos are, therefore, two districts shy of proportional representation. Even deeming this disproportionality insubstantial would not overcome the other evidence of vote dilution for Latinos in District 23. The changes there undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive. Cf., *e. g.*, *id.*, at 1014. Against this background, the Latinos' diminishing electoral support for the incumbent indicates their belief he was unresponsive to their particularized needs. In essence, the State took away their opportunity because they were about to exercise it. Even accepting the District Court's finding that the State's action was taken primarily for political, not racial, reasons, the redrawing of District 23's lines was damaging to its Latino voters. The State not only made fruitless the Latinos' mobilization efforts but also acted against those Latinos who were becoming most politically active. Although incumbency protection can be a legitimate factor in districting, see *Karcher* v. *Daggett*, 462 U. S. 725, 740, not all of its forms are in the interests of the constituents. If, as here, such protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters. This policy, whatever its validity in the political realm, cannot justify the effect on Latino voters. See *Gingles*, *supra*, at 45. Pp. 436–442.

(e) Because Plan 1374C violates §2 in its redrawing of District 23, appellants' First Amendment and equal protection claims with respect to that district need not be addressed. Their equal protection claim as to the drawing of District 25 need not be confronted because that district will have to be redrawn to remedy the District 23 violation. Pp. 442–443.

JUSTICE KENNEDY concluded in Part II that because appellants have established no legally impermissible use of political classifications, they state no claim on which relief may be granted as to their contention that Texas' statewide redistricting is an unconstitutional political gerry-

mander. JUSTICE SOUTER and JUSTICE GINSBURG joined Part II–D. Pp. 414–423.

(a) Article I of the Constitution, §§2 and 4, gives "the States primary responsibility for apportionment of their . . . congressional . . . districts," *Growe* v. *Emison*, 507 U. S. 25, 34, but §4 also permits Congress to set further requirements. Neither the Constitution nor Congress has stated any explicit prohibition of mid-decade redistricting to change districts drawn earlier in conformance with a decennial census. Although the legislative branch plays the primary role in congressional redistricting, courts have an important role when a districting plan violates the Constitution. See, *e. g.*, *Wesberry* v. *Sanders*, 376 U. S. 1. That the federal courts sometimes must order legislative redistricting, however, does not shift the primary responsibility away from legislative bodies, see, *e. g.*, *Wise* v. *Lipscomb*, 437 U. S. 535, 540, who are free to replace court-mandated remedial plans by enacting redistricting plans of their own, see, *e. g.*, *Upham* v. *Seamon*, 456 U. S. 37, 44. Judicial respect for legislative plans, however, cannot justify legislative reliance on improper criteria for districting determinations. Pp. 414–416.

(b) Appellants claim unpersuasively that a decision to effect mid-decennial redistricting, when solely motivated by partisan objectives, presumptively violates equal protection and the First Amendment because it serves no legitimate public purpose and burdens one group because of its political opinions and affiliation. For a number of reasons, that test is unconvincing. There is some merit to the State's assertion that partisan gain was not the sole motivation for replacing Plan 1151C: The contours of some contested district lines seem to have been drawn based on more mundane and local interests, and a number of line-drawing requests by Democratic state legislators were honored. Moreover, a successful test for identifying unconstitutional partisan gerrymandering must do what appellants' sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants' representational rights. See *Vieth*, 541 U. S., at 292–295, 307–308. Appellants' sole-intent standard is no more compelling when it is linked to the circumstance that Plan 1374C is mid-decennial legislation. The Constitution's text and structure and this Court's cases indicate there is nothing inherently suspect about a legislature's decision to replace mid-decade a court-ordered plan with one of its own. Even if there were, the fact of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders. Appellants' test would leave untouched the 1991 Texas redistricting, which entrenched a party on the verge of minority status, while striking down the 2003 redistricting plan, which resulted in the majority Republican Party capturing a larger share of the seats. A test that treats these two similarly effective

power plays in such different ways does not have the reliability appellants ascribe to it. Pp. 416–420.

(c) Appellants' political gerrymandering theory that mid-decade redistricting for exclusively partisan purposes violates the one-person, one-vote requirement is rejected. Although conceding that States operate under the legal fiction that their plans are constitutionally apportioned throughout a decade, see, *e. g.*, *Georgia* v. *Ashcroft*, 539 U. S. 461, 488, n. 2, appellants contend that this fiction should not provide a safe harbor for a legislature that enacts a voluntary, mid-decade plan overriding a legal court-drawn plan. This argument mirrors appellants' attack on mid-decennial redistricting solely motivated by partisan considerations and is unsatisfactory for the same reasons. Their further contention that the legislature intentionally sought to manipulate population variances when it enacted Plan 1374C is unconvincing because there is no District Court finding to that effect, and they present no specific evidence to support this serious allegation of bad faith. Because they have not demonstrated that the legislature's decision to enact Plan 1374C constitutes a violation of the equal-population requirement, their subsidiary reliance on *Larios* v. *Cox*, 300 F. Supp. 2d 1320, summarily aff'd, 542 U. S. 947, is unavailing. Pp. 420–423.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE and JUSTICE ALITO, concluded in Part IV that the Dallas area redistricting does not violate §2 of the Voting Rights Act. Appellants allege that the Dallas changes dilute African-American voting strength because an African-American minority effectively controlled District 24 under Plan 1151C. However, before Plan 1374C, District 24 had elected an Anglo Democrat to Congress in every election since 1978. Since then, moreover, the incumbent has had no opposition in any of his primary elections, and African-Americans have consistently voted for him. African-Americans were the second-largest racial group in the district after Anglos, but had only 25.7% of the citizen voting-age population. Even assuming that the first *Gingles* prong can accommodate appellants' assertion that a §2 claim may be stated for a racial group that makes up less than 50% of the population, see, *e. g.*, *De Grandy*, *supra*, at 1009, they must show they constitute "a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes," *Voinovich* v. *Quilter*, 507 U. S. 146, 158. The District Court committed no clear error in rejecting questionable evidence that African-Americans have the ability to elect their candidate of choice in favor of other evidence that an African-American candidate of choice would not prevail. See *Anderson* v. *Bessemer City*, 470 U. S. 564, 574. That African-Americans had influence in the district does not suffice to state a §2 claim. If it did, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions. See *Georgia* v.

Ashcroft, 539 U. S. 461, 491. *Id.*, at 480, 482, distinguished. Appellants do not raise a district-specific political gerrymandering claim against District 24. Pp. 443–447.

THE CHIEF JUSTICE, joined by JUSTICE ALITO, agreed that appellants have not provided a reliable standard for identifying unconstitutional political gerrymanders, but noted that the question whether any such standard exists—*i. e.*, whether a challenge to such a gerrymander presents a justiciable case or controversy—has not been argued in these cases. THE CHIEF JUSTICE and JUSTICE ALITO therefore take no position on that question, which has divided the Court, see *Vieth* v. *Jubelirer*, 541 U. S. 267, and join the plurality's Part II disposition without specifying whether appellants have failed to state a claim on which relief can be granted or failed to present a justiciable controversy. Pp. 492–493.

JUSTICE SCALIA, joined by JUSTICE THOMAS, concluded that appellants' claims of unconstitutional political gerrymandering do not present a justiciable case or controversy, see *Vieth* v. *Jubelirer*, 541 U. S. 267, 271–306 (plurality opinion), and that their vote-dilution claims premised on §2 of the Voting Rights Act of 1965 lack merit for the reasons set forth in JUSTICE THOMAS's opinion concurring in the judgment in *Holder* v. *Hall*, 512 U. S. 874, 891–946. Reviewing appellants' race-based equal protection claims, JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO, concluded that the District Court did not commit clear error in rejecting appellant GI Forum's assertion that the removal of Latino residents from District 23 constituted intentional vote dilution. JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO, subjected the intentional creation of District 25 as a majority-minority district to strict scrutiny and held that standard satisfied because appellants conceded that the creation of this district was reasonably necessary to comply with §5 of the Voting Rights Act of 1965, which is a compelling state interest, and did not argue that Texas did more than that provision required it to do. Pp. 512–520.

KENNEDY, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts II–A and III, in which STEVENS, SOUTER, GINSBURG, AND BREYER, JJ., joined, an opinion with respect to Parts I and IV, in which ROBERTS, C. J., and ALITO, J., joined, an opinion with respect to Parts II–B and II–C, and an opinion with respect to Part II–D, in which SOUTER and GINSBURG, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BREYER, J., joined as to Parts I and II, *post*, p. 447. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, J., joined, *post*, p. 483. BREYER, J., filed an opinion concurring in part

and dissenting in part, *post*, p. 491. ROBERTS, C. J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which ALITO, J., joined, *post*, p. 492. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part, in which THOMAS, J., joined, and in which ROBERTS, C. J., and ALITO, J., joined as to Part III, *post*, p. 511.

Paul M. Smith argued the cause for appellants in No. 05–276. With him on the briefs for appellants were *Sam Hirsch* and *J. Gerald Hebert*.

Nina Perales argued the cause for appellants in No. 05–439. With her on the briefs was *David Herrera Urias*.

R. Ted Cruz, Solicitor General of Texas, argued the cause for the state appellees in all cases. With him on the brief were *Greg Abbott*, Attorney General, *Barry R. McBee*, First Assistant Attorney General, *Edward D. Burbach*, Deputy Attorney General, and *Don Cruse*, *Joel L. Thollander*, and *Adam W. Aston*, Assistant Solicitors General.

Deputy Solicitor General Garre argued the cause for the United States as *amicus curiae* urging affirmance in support of the state appellees. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Kim*, *James A. Feldman*, *David K. Flynn*, and *Lisa J. Stark*.

Rolando L. Rios, *George Korbel*, *Jose Garza*, and *Judith A. Sanders-Castro* filed briefs for the League of United Latin American Citizens et al., appellants in No. 05–204. *Renea Hicks* filed briefs for Travis County, Texas, et al., appellants in No. 05–254.

Michael A. Carvin and *Louis K. Fisher* filed a brief in all cases for appellees Tina Benkiser et al. *Robert M. Long* filed a brief in all cases for appellee Charles Soechting, in support of appellants. *John S. Ament III* and *Richard Gladden* filed briefs for Frenchie Henderson, appellee in support of appellant Travis County, Texas, et al. in No. 05–254. *Gary L. Bledsoe*, *David T. Goldberg*, *Sean H. Donahue*, and *Dennis Courtland Hayes* filed briefs for the Texas State-Area Conference of the National Association for the Ad-

vancement of Colored People in support of appellants in No. 05–276.†

JUSTICE KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to Parts II–A and III, an opinion with respect to Parts I and IV, in

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†Briefs of *amici curiae* urging reversal in all cases were filed for the Brennan Center for Justice by *Deborah Goldberg* and *Michael Waldman;* for the Center for American Progress by *Walter Dellinger, Jonathan D. Hacker, Matthew M. Shors,* and *Jeffrey M. Wice;* for the Reform Institute et al. by *Daniel R. Ortiz;* for University Professors et al. by *Lucas A. Powe, Jr.;* and for Samuel Issacharoff et al. by *Richard H. Pildes, pro se,* and *Mr. Issacharoff, pro se.*

David W. Ogden, Jonathan E. Nuechterlein, Leonard M. Shambon, and *Jonathan H. Siegelbaum* filed a brief of *amici curiae* for the League of Women Voters of the United States et al. urging reversal in Nos. 05–204, 05–254, and 05–276.

Harold D. Hammett filed a brief for the Fort Worth-Tarrant County Branch NAACP as *amicus curiae* urging reversal in No. 05–276.

Briefs of *amici curiae* urging affirmance in all cases were filed for the State of Utah et al. by *Mark Shurtleff,* Attorney General of Utah, *Gene C. Schaerr, Steffen N. Johnson, James R. Thompson, George J. Chanos,* Attorney General of Nevada, and *Jim Petro,* Attorney General of Ohio; for the American Legislative Exchange Council et al. by *Marguerite Mary Leoni;* for the Republican National Committee by *Thomas J. Josefiak;* for Senator Robert C. Jubelirer by *John P. Krill, Jr.,* and *Linda J. Shorey;* for the Speaker of the Georgia House of Representatives Glenn Richardson et al. by *Anne W. Lewis* and *Frank B. Strickland;* and for Ron Wilson by *S. Shawn Stephens* and *Mr. Wilson, pro se.*

Maureen E. Mahoney filed a brief for Congressman Henry Bonilla as *amicus curiae* urging affirmance in No. 05–439.

Briefs of *amici curiae* were filed in all cases for the NAACP Legal Defense and Educational Fund, Inc., by *Theodore M. Shaw, Jacqueline A. Berrien, Norman J. Chachkin,* and *Debo P. Adegbile;* for Edward Blum et al. by *Frank M. Reilly* and *Marc A. Levin;* for Alan Heslop et al. by *E. Marshall Braden, Robert M. Doherty,* and *Clark H. Bensen;* and for Gary King et al. by *Justin A. Nelson* and *H. Lee Godfrey.*

Briefs of *amici curiae* were filed in No. 05–276 for the North Carolina State Conference of the National Association for the Advancement of Colored People by *Anita S. Earls, Julius L. Chambers,* and *John Charles Boger;* and for Neil H. Cogan by *Mr. Cogan, pro se.*

which THE CHIEF JUSTICE and JUSTICE ALITO join, an opinion with respect to Parts II–B and II–C, and an opinion with respect to Part II–D, in which JUSTICE SOUTER and JUSTICE GINSBURG join.

These four consolidated cases are appeals from a judgment entered by the United States District Court for the Eastern District of Texas. Convened as a three-judge court under 28 U. S. C. § 2284, the court heard appellants' constitutional and statutory challenges to a 2003 enactment of the Texas State Legislature that drew new district lines for the 32 seats Texas holds in the United States House of Representatives. (Though appellants do not join each other as to all claims, for the sake of convenience we refer to appellants collectively.) In 2004 the court entered judgment for appellees and issued detailed findings of fact and conclusions of law. *Session* v. *Perry*, 298 F. Supp. 2d 451 *(per curiam)*. This Court vacated that decision and remanded for consideration in light of *Vieth* v. *Jubelirer*, 541 U. S. 267 (2004). 543 U. S. 941 (2004). The District Court reexamined appellants' political gerrymandering claims and, in a second careful opinion, again held for the defendants. *Henderson* v. *Perry*, 399 F. Supp. 2d 756 (2005). These appeals followed, and we noted probable jurisdiction. 546 U. S. 1074 (2005).

Appellants contend the new plan is an unconstitutional partisan gerrymander and that the redistricting statewide violates § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U. S. C. § 1973. Appellants also contend that the use of race and politics in drawing lines of specific districts violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The three-judge panel, consisting of Circuit Judge Higginbotham and District Judges Ward and Rosenthal, brought considerable experience and expertise to the instant action, based on their knowledge of the State's people, history, and geography. Judges Higginbotham and Ward, moreover, had served on the three-judge court that drew the plan the Texas Legisla-

ture replaced in 2003, so they were intimately familiar with the history and intricacies of the cases.

We affirm the District Court's dispositions on the statewide political gerrymandering claims and the Voting Rights Act claim against District 24. We reverse and remand on the Voting Rights Act claim with respect to District 23. Because we do not reach appellants' race-based equal protection claim or the political gerrymandering claim as to District 23, we vacate the judgment of the District Court on these claims.

I

To set out a proper framework for the cases, we first recount the history of the litigation and recent districting in Texas. An appropriate starting point is not the reapportionment in 2000 but the one from the census in 1990.

The 1990 census resulted in a 30-seat congressional delegation for Texas, an increase of 3 seats over the 27 representatives allotted to the State in the decade before. See *Bush* v. *Vera*, 517 U. S. 952, 956–957 (1996). In 1991 the Texas Legislature drew new district lines. At the time, the Democratic Party controlled both houses in the state legislature, the governorship, and 19 of the State's 27 seats in Congress. Yet change appeared to be on the horizon. In the previous 30 years the Democratic Party's post-Reconstruction dominance over the Republican Party had eroded, and by 1990 the Republicans received 47% of the statewide vote, while the Democrats received 51%. *Henderson*, *supra*, at 763; Brief for Appellee Perry et al. in No. 05–204 etc., p. 2 (hereinafter Brief for State Appellees).

Faced with a Republican opposition that could be moving toward majority status, the state legislature drew a congressional redistricting plan designed to favor Democratic candidates. Using then-emerging computer technology to draw district lines with artful precision, the legislature enacted a plan later described as the "shrewdest gerrymander of the 1990s." M. Barone, R. Cohen, & C. Cook, Almanac of Amer-

ican Politics 2002, p. 1448 (2001). See *Henderson*, *supra*, at 767, and n. 47. Although the 1991 plan was enacted by the state legislature, Democratic Congressman Martin Frost was acknowledged as its architect. *Session*, *supra*, at 482. The 1991 plan "carefully constructs democratic districts 'with incredibly convoluted lines' and packs 'heavily Republican' suburban areas into just a few districts." *Henderson*, *supra*, at 767, n. 47 (quoting M. Barone & R. Cohen, Almanac of American Politics 2004, p. 1510 (2003) (hereinafter 2004 Almanac)).

Voters who considered this unfair and unlawful treatment sought to invalidate the 1991 plan as an unconstitutional partisan gerrymander, but to no avail. See *Terrazas* v. *Slagle*, 789 F. Supp. 828, 833 (WD Tex. 1992); *Terrazas* v. *Slagle*, 821 F. Supp. 1162, 1175 (WD Tex. 1993) *(per curiam)*. The 1991 plan realized the hopes of Democrats and the fears of Republicans with respect to the composition of the Texas congressional delegation. The 1990's were years of continued growth for the Texas Republican Party, and by the end of the decade it was sweeping elections for statewide office. Nevertheless, despite carrying 59% of the vote in statewide elections in 2000, the Republicans only won 13 congressional seats to the Democrats' 17. *Henderson*, *supra*, at 763.

These events likely were not forgotten by either party when it came time to draw congressional districts in conformance with the 2000 census and to incorporate two additional seats for the Texas delegation. The Republican Party controlled the governorship and the State Senate; it did not yet control the State House of Representatives, however. As so constituted, the legislature was unable to pass a redistricting scheme, resulting in litigation and the necessity of a court-ordered plan to comply with the Constitution's one-person, one-vote requirement. See *Balderas* v. *Texas*, Civ. Action No. 6:01CV158 (ED Tex., Nov. 14, 2001) *(per curiam)*, summarily aff'd, 536 U. S. 919 (2002), App. E to Juris. Statement in No. 05–276, p. 202a (hereinafter *Balderas*, App. E to

Juris. Statement). The congressional districting map resulting from the *Balderas* litigation is known as Plan 1151C.

As we have said, two members of the three-judge court that drew Plan 1151C later served on the three-judge court that issued the judgment now under review. Thus we have the benefit of their candid comments concerning the redistricting approach taken in the *Balderas* litigation. Conscious that the primary responsibility for drawing congressional districts is given to political branches of government, and hesitant to "und[o] the work of one political party for the benefit of another," the three-judge *Balderas* court sought to apply "only 'neutral' redistricting standards" when drawing Plan 1151C. *Henderson*, 399 F. Supp. 2d, at 768. Once the District Court applied these principles—such as placing the two new seats in high-growth areas, following county and voting precinct lines, and avoiding the pairing of incumbents—"the drawing ceased, leaving the map free of further change except to conform it to one-person, one-vote." *Ibid.* Under Plan 1151C, the 2002 congressional elections resulted in a 17-to-15 Democratic majority in the Texas delegation, compared to a 59% to 40% Republican majority in votes for statewide office in 2000. *Id.*, at 763–764. Reflecting on the *Balderas* plan, the District Court in *Henderson* was candid to acknowledge "[t]he practical effect of this effort was to leave the 1991 Democratic Party gerrymander largely in place as a 'legal' plan." 399 F. Supp. 2d, at 768.

The continuing influence of a court-drawn map that "perpetuated much of [the 1991] gerrymander," *ibid.*, was not lost on Texas Republicans when, in 2003, they gained control of the State House of Representatives and, thus, both houses of the legislature. The Republicans in the legislature "set out to increase their representation in the congressional delegation." *Session*, 298 F. Supp. 2d, at 471. See also *id.*, at 470 ("There is little question but that the single-minded purpose of the Texas Legislature in enacting [a new plan] was to gain partisan advantage"). After a protracted partisan

struggle, during which Democratic legislators left the State for a time to frustrate quorum requirements, the legislature enacted a new congressional districting map in October 2003. It is called Plan 1374C. The 2004 congressional elections did not disappoint the plan's drafters. Republicans won 21 seats to the Democrats' 11, while also obtaining 58% of the vote in statewide races against the Democrats' 41%. *Henderson, supra,* at 764.

Soon after Texas enacted Plan 1374C, appellants challenged it in court, alleging a host of constitutional and statutory violations. Initially, the District Court entered judgment against appellants on all their claims. See *Session*, 298 F. Supp. 2d, at 457; *id.*, at 515 (Ward, J., concurring in part and dissenting in part). Appellants sought relief here and, after their jurisdictional statements were filed, this Court issued *Vieth* v. *Jubelirer.* Our order vacating the District Court judgment and remanding for consideration in light of *Vieth* was issued just weeks before the 2004 elections. See 543 U. S. 941 (Oct. 18, 2004). On remand, the District Court, believing the scope of its mandate was limited to questions of political gerrymandering, again rejected appellants' claims. *Henderson*, 399 F. Supp. 2d, at 777–778. Judge Ward would have granted relief under the theory—presented to the court for the first time on remand—that mid-decennial redistricting violates the one-person, one-vote requirement, but he concluded such an argument was not within the scope of the remand mandate. *Id.*, at 779, 784–785 (specially concurring).

II

A

Based on two similar theories that address the mid-decade character of the 2003 redistricting, appellants now argue that Plan 1374C should be invalidated as an unconstitutional partisan gerrymander. In *Davis* v. *Bandemer*, 478 U. S. 109 (1986), the Court held that an equal protection challenge to a political gerrymander presents a justiciable case or contro-

versy, *id.*, at 118–127, but there was disagreement over what substantive standard to apply. Compare *id.*, at 127–137 (plurality opinion), with *id.*, at 161–162 (Powell, J., concurring in part and dissenting in part). That disagreement persists. A plurality of the Court in *Vieth* would have held such challenges to be nonjusticiable political questions, but a majority declined to do so. See 541 U. S., at 306 (KENNEDY, J., concurring in judgment); *id.*, at 317 (STEVENS, J., dissenting); *id.*, at 343 (SOUTER, J., dissenting); *id.*, at 355 (BREYER, J., dissenting). We do not revisit the justiciability holding but do proceed to examine whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution.

B

Before addressing appellants' arguments on mid-decade redistricting, it is appropriate to note some basic principles on the roles the States, Congress, and the courts play in determining how congressional districts are to be drawn. Article I of the Constitution provides:

> "Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .
>
> . . . . . .
>
> "Section 4. The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ."

This text, we have explained, "leaves with the States primary responsibility for apportionment of their federal congressional . . . districts." *Growe* v. *Emison*, 507 U. S. 25, 34 (1993); see also *Chapman* v. *Meier*, 420 U. S. 1, 27 (1975) ("[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body"); *Smiley*

v. *Holm*, 285 U. S. 355, 366–367 (1932) (reapportionment implicated State's powers under Art. I, §4). Congress, as the text of the Constitution also provides, may set further requirements, and with respect to districting it has generally required single-member districts. See U. S. Const., Art. I, §4; Pub. L. 90–196, 81 Stat. 581, 2 U. S. C. §2c; *Branch* v. *Smith*, 538 U. S. 254, 266–267 (2003). But see *id.*, at 275 (plurality opinion) (multimember districts permitted by 55 Stat. 762, 2 U. S. C. §2a(c) in limited circumstances). With respect to a mid-decade redistricting to change districts drawn earlier in conformance with a decennial census, the Constitution and Congress state no explicit prohibition.

Although the legislative branch plays the primary role in congressional redistricting, our precedents recognize an important role for the courts when a districting plan violates the Constitution. See, *e. g.*, *Wesberry* v. *Sanders*, 376 U. S. 1 (1964). This litigation is an example, as we have discussed. When Texas did not enact a plan to comply with the one-person, one-vote requirement under the 2000 census, the District Court found it necessary to draw a redistricting map on its own. That the federal courts sometimes are required to order legislative redistricting, however, does not shift the primary locus of responsibility.

> "Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation' of the federal court to devise and impose a reapportionment plan pending later legislative action." *Wise* v. *Lipscomb*, 437 U. S. 535, 540 (1978) (principal opinion) (quoting *Connor* v. *Finch*, 431 U. S. 407, 415 (1977)).

Quite apart from the risk of acting without a legislature's expertise, and quite apart from the difficulties a court faces in drawing a map that is fair and rational, see *id.*, at 414–415,

the obligation placed upon the Federal Judiciary is unwelcome because drawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance. That Congress is the federal body explicitly given constitutional power over elections is also a noteworthy statement of preference for the democratic process. As the Constitution vests redistricting responsibilities foremost in the legislatures of the States and in Congress, a lawful, legislatively enacted plan should be preferable to one drawn by the courts.

It should follow, too, that if a legislature acts to replace a court-drawn plan with one of its own design, no presumption of impropriety should attach to the legislative decision to act. As the District Court noted here, *Session*, 298 F. Supp. 2d, at 460–461, our decisions have assumed that state legislatures are free to replace court-mandated remedial plans by enacting redistricting plans of their own. See, *e. g.*, *Upham* v. *Seamon*, 456 U. S. 37, 44 (1982) *(per curiam)*; *Wise*, *supra*, at 540 (principal opinion) (quoting *Connor*, *supra*, at 415); *Burns* v. *Richardson*, 384 U. S. 73, 85 (1966); *Reynolds* v. *Sims*, 377 U. S. 533, 587 (1964). Underlying this principle is the assumption that to prefer a court-drawn plan to a legislature's replacement would be contrary to the ordinary and proper operation of the political process. Judicial respect for legislative plans, however, cannot justify legislative reliance on improper criteria for districting determinations. With these considerations in mind, I now turn to consider appellants' challenges to the new redistricting plan.

C

Appellants claim that Plan 1374C, enacted by the Texas Legislature in 2003, is an unconstitutional political gerrymander. A decision, they claim, to effect mid-decennial redistricting, when solely motivated by partisan objectives, violates equal protection and the First Amendment because it

serves no legitimate public purpose and burdens one group because of its political opinions and affiliation. The mid-decennial nature of the redistricting, appellants say, reveals the legislature's sole motivation. Unlike *Vieth*, where the legislature acted in the context of a required decennial redistricting, the Texas Legislature voluntarily replaced a plan that itself was designed to comply with new census data. Because Texas had "no constitutional obligation to act at all" in 2003, Brief for Appellant Jackson et al. in No. 05–276, p. 26, it is hardly surprising, according to appellants, that the District Court found "[t]here is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage" for the Republican majority over the Democratic minority, *Session*, *supra*, at 470.

A rule, or perhaps a presumption, of invalidity when a mid-decade redistricting plan is adopted solely for partisan motivations is a salutary one, in appellants' view, for then courts need not inquire about, nor parties prove, the discriminatory effects of partisan gerrymandering—a matter that has proved elusive since *Bandemer*. See *Vieth*, 541 U. S., at 281 (plurality opinion); *Bandemer*, 478 U. S., at 127 (plurality opinion). Adding to the test's simplicity is that it does not quibble with the drawing of individual district lines but challenges the decision to redistrict at all.

For a number of reasons, appellants' case for adopting their test is not convincing. To begin with, the state appellees dispute the assertion that partisan gain was the "sole" motivation for the decision to replace Plan 1151C. There is some merit to that criticism, for the pejorative label overlooks indications that partisan motives did not dictate the plan in its entirety. The legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority, but partisan aims did not guide every line it drew. As the District Court found, the contours of some contested district lines were drawn based

on more mundane and local interests. *Session*, *supra*, at 472–473. The state appellees also contend, and appellants do not contest, that a number of line-drawing requests by Democratic state legislators were honored. Brief for State Appellees 34.

Evaluating the legality of acts arising out of mixed motives can be complex, and affixing a single label to those acts can be hazardous, even when the actor is an individual performing a discrete act. See, *e. g.*, *Hartman* v. *Moore*, 547 U. S. 250, 259–260 (2006). When the actor is a legislature and the act is a composite of manifold choices, the task can be even more daunting. Appellants' attempt to separate the legislature's sole motive for discarding Plan 1151C from the complex of choices it made while drawing the lines of Plan 1374C seeks to avoid that difficulty. We should be skeptical, however, of a claim that seeks to invalidate a statute based on a legislature's unlawful motive but does so without reference to the content of the legislation enacted.

Even setting this skepticism aside, a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants' sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants' representational rights. For this reason, a majority of the Court rejected a test proposed in *Vieth* that is markedly similar to the one appellants present today. Compare 541 U. S., at 336 (STEVENS, J., dissenting) ("Just as race can be a factor in, but cannot dictate the outcome of, the districting process, so too can partisanship be a permissible consideration in drawing district lines, so long as it does not predominate"), and *id.*, at 338 ("[A]n acceptable rational basis can be neither purely personal nor purely partisan"), with *id.*, at 292–295 (plurality opinion), and *id.*, at 307–308 (KENNEDY, J., concurring in judgment).

The sole-intent standard offered here is no more compelling when it is linked to the circumstance that Plan 1374C is mid-decennial legislation. The text and structure of the

Constitution and our case law indicate there is nothing inherently suspect about a legislature's decision to replace mid-decade a court-ordered plan with one of its own. And even if there were, the fact of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders. Under appellants' theory, a highly effective partisan gerrymander that coincided with decennial redistricting would receive less scrutiny than a bumbling, yet solely partisan, mid-decade redistricting. More concretely, the test would leave untouched the 1991 Texas redistricting, which entrenched a party on the verge of minority status, while striking down the 2003 redistricting plan, which resulted in the majority Republican Party capturing a larger share of the seats. A test that treats these two similarly effective power plays in such different ways does not have the reliability appellants ascribe to it.

Furthermore, compared to the map challenged in *Vieth*, which led to a Republican majority in the congressional delegation despite a Democratic majority in the statewide vote, Plan 1374C can be seen as making the party balance more congruent to statewide party power. To be sure, there is no constitutional requirement of proportional representation, and equating a party's statewide share of the vote with its portion of the congressional delegation is a rough measure at best. Nevertheless, a congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority. See *Gaffney* v. *Cummings*, 412 U. S. 735, 754 (1973). By this measure, Plan 1374C can be seen as fairer than the plan that survived in *Vieth* and the two previous Texas plans—all three of which would pass the modified sole-intent test that Plan 1374C would fail.

A brief for one of the *amici* proposes a symmetry standard that would measure partisan bias by "compar[ing] how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote." Brief for Gary

King et al. 5. Under that standard the measure of a map's bias is the extent to which a majority party would fare better than the minority party, should their respective shares of the vote reverse. *Amici*'s proposed standard does not compensate for appellants' failure to provide a reliable measure of fairness. The existence or degree of asymmetry may in large part depend on conjecture about where possible vote-switchers will reside. Even assuming a court could choose reliably among different models of shifting voter preferences, we are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs. Presumably such a challenge could be litigated if and when the feared inequity arose. Cf. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 148 (1967). More fundamentally, the counterfactual plaintiff would face the same problem as the present, actual appellants: providing a standard for deciding how much partisan dominance is too much. Without altogether discounting its utility in redistricting planning and litigation, I would conclude asymmetry alone is not a reliable measure of unconstitutional partisanship.

In the absence of any other workable test for judging partisan gerrymanders, one effect of appellants' focus on mid-decade redistricting could be to encourage partisan excess at the outset of the decade, when a legislature redistricts pursuant to its decennial constitutional duty and is then immune from the charge of sole motivation. If mid-decade redistricting were barred or at least subject to close judicial oversight, opposition legislators would also have every incentive to prevent passage of a legislative plan and try their luck with a court that might give them a better deal than negotiation with their political rivals. See *Henderson*, 399 F. Supp. 2d, at 776–777.

D

Appellants' second political gerrymandering theory is that mid-decade redistricting for exclusively partisan purposes

violates the one-person, one-vote requirement. They observe that population variances in legislative districts are tolerated only if they "are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Karcher* v. *Daggett*, 462 U. S. 725, 730 (1983) (quoting *Kirkpatrick* v. *Preisler*, 394 U. S. 526, 531 (1969); internal quotation marks omitted). Working from this unchallenged premise, appellants contend that, because the population of Texas has shifted since the 2000 census, the 2003 redistricting, which relied on that census, created unlawful interdistrict population variances.

To distinguish the variances in Plan 1374C from those of ordinary, 3-year-old districting plans or belatedly drawn court-ordered plans, appellants again rely on the voluntary, mid-decade nature of the redistricting and its partisan motivation. Appellants do not contend that a decennial redistricting plan would violate equal representation three or five years into the decade if the State's population had shifted substantially. As they must, they concede that States operate under the legal fiction that their plans are constitutionally apportioned throughout the decade, a presumption that is necessary to avoid constant redistricting, with accompanying costs and instability. See *Georgia* v. *Ashcroft*, 539 U. S. 461, 488, n. 2 (2003); *Reynolds*, 377 U. S., at 583. Appellants agree that a plan implemented by a court in 2001 using 2000 population data also enjoys the benefit of the so-called legal fiction, presumably because belated court-drawn plans promote other important interests, such as ensuring a plan complies with the Constitution and voting rights legislation.

In appellants' view, however, this fiction should not provide a safe harbor for a legislature that enacts a voluntary, mid-decade plan overriding a legal court-drawn plan, thus "'unnecessarily'" creating population variance "when there was no legal compulsion" to do so. Brief for Appellant Travis County et al. in No. 05–254, p. 18. This is particularly so, appellants say, when a legislature acts because of an

exclusively partisan motivation. Under appellants' theory this improper motive at the outset seems enough to condemn the map for violating the equal-population principle. For this reason, appellants believe that the State cannot justify under *Karcher* v. *Daggett* the population variances in Plan 1374C because they are the product of partisan bias and the desire to eliminate all competitive districts.

As the District Court noted, this is a test that turns not on whether a redistricting furthers equal-population principles but rather on the justification for redrawing a plan in the first place. *Henderson*, *supra*, at 776. In that respect appellants' approach merely restates the question whether it was permissible for the Texas Legislature to redraw the districting map. Appellants' answer, which mirrors their attack on mid-decennial redistricting solely motivated by partisan considerations, is unsatisfactory for reasons we have already discussed.

Appellants also contend that the legislature intentionally sought to manipulate population variances when it enacted Plan 1374C. There is, however, no District Court finding to that effect, and appellants present no specific evidence to support this serious allegation of bad faith. Because appellants have not demonstrated that the legislature's decision to enact Plan 1374C constitutes a violation of the equal-population requirement, we find unavailing their subsidiary reliance on *Larios* v. *Cox*, 300 F. Supp. 2d 1320 (ND Ga.) *(per curiam)*, summarily aff'd, 542 U. S. 947 (2004). In *Larios*, the District Court reviewed the Georgia Legislature's decennial redistricting of its State Senate and House of Representatives districts and found deviations from the equal-population requirement. The District Court then held the objectives of the drafters, which included partisan interests along with regionalist bias and inconsistent incumbent protection, did not justify those deviations. 300 F. Supp. 2d, at 1351–1352. The *Larios* holding and its examination of the legislature's motivations were relevant only in response to

an equal-population violation, something appellants have not established here. Even in addressing political motivation as a justification for an equal-population violation, moreover, *Larios* does not give clear guidance. The panel explained it "need not resolve the issue of whether or when partisan advantage alone may justify deviations in population" because the plans were "plainly unlawful" and any partisan motivations were "bound up inextricably" with other clearly rejected objectives. *Id.*, at 1352.

In sum, we disagree with appellants' view that a legislature's decision to override a valid, court-drawn plan mid-decade is sufficiently suspect to give shape to a reliable standard for identifying unconstitutional political gerrymanders. We conclude that appellants have established no legally impermissible use of political classifications. For this reason, they state no claim on which relief may be granted for their statewide challenge.

III

Plan 1374C made changes to district lines in south and west Texas that appellants challenge as violations of §2 of the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment. The most significant changes occurred to District 23, which—both before and after the redistricting—covers a large land area in west Texas, and to District 25, which earlier included Houston but now includes a different area, a north-south strip from Austin to the Rio Grande Valley.

After the 2002 election, it became apparent that District 23 as then drawn had an increasingly powerful Latino population that threatened to oust the incumbent Republican, Henry Bonilla. Before the 2003 redistricting, the Latino share of the citizen voting-age population was 57.5%, and Bonilla's support among Latinos had dropped with each successive election since 1996. *Session*, 298 F. Supp. 2d, at 488–489. In 2002, Bonilla captured only 8% of the Latino vote,

ibid., and 51.5% of the overall vote. Faced with this loss of voter support, the legislature acted to protect Bonilla's incumbency by changing the lines—and hence the population mix—of the district. To begin with, the new plan divided Webb County and the city of Laredo, on the Mexican border, that formed the county's population base. Webb County, which is 94% Latino, had previously rested entirely within District 23; under the new plan, nearly 100,000 people were shifted into neighboring District 28. *Id.*, at 489. The rest of the county, approximately 93,000 people, remained in District 23. To replace the numbers District 23 lost, the State added voters in counties comprising a largely Anglo, Republican area in central Texas. *Id.*, at 488. In the newly drawn district, the Latino share of the citizen voting-age population dropped to 46%, though the Latino share of the total voting-age population remained just over 50%. *Id.*, at 489.

These changes required adjustments elsewhere, of course, so the State inserted a third district between the two districts to the east of District 23, and extended all three of them farther north. New District 25 is a long, narrow strip that winds its way from McAllen and the Mexican-border towns in the south to Austin, in the center of the State and 300 miles away. *Id.*, at 502. In between it includes seven full counties, but 77% of its population resides in split counties at the northern and southern ends. Of this 77%, roughly half reside in Hidalgo County, which includes McAllen, and half are in Travis County, which includes parts of Austin. *Ibid.* The Latinos in District 25, comprising 55% of the district's citizen voting-age population, are also mostly divided between the two distant areas, north and south. *Id.*, at 499. The Latino communities at the opposite ends of District 25 have divergent "needs and interests," *id.*, at 502, owing to "differences in socio-economic status, education, employment, health, and other characteristics," *id.*, at 512.

The District Court summed up the purposes underlying the redistricting in south and west Texas: "The change to

Congressional District 23 served the dual goal of increasing Republican seats in general and protecting Bonilla's incumbency in particular, with the additional political nuance that Bonilla would be reelected in a district that had a majority of Latino voting age population—although clearly not a majority of citizen voting age population and certainly not an effective voting majority." *Id.*, at 497. The goal in creating District 25 was just as clear: "[t]o avoid retrogression under § 5" of the Voting Rights Act given the reduced Latino voting strength in District 23. *Id.*, at 489.

A

The question we address is whether Plan 1374C violates § 2 of the Voting Rights Act. A State violates § 2

> "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U. S. C. § 1973(b).

The Court has identified three threshold conditions for establishing a § 2 violation: (1) the racial group is "'"sufficiently large and geographically compact to constitute a majority in a single-member district"'"; (2) the racial group is "'"politically cohesive"'"; and (3) the majority "'"vot[es] sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."'" *Johnson* v. *De Grandy*, 512 U. S. 997, 1006–1007 (1994) (quoting *Growe*, 507 U. S., at 40 (in turn quoting *Thornburg* v. *Gingles*, 478 U. S. 30, 50–51 (1986))). These are the so-called *Gingles* requirements.

If all three *Gingles* requirements are established, the statutory text directs us to consider the "totality of circumstances" to determine whether members of a racial group

have less opportunity than do other members of the electorate. *De Grandy, supra,* at 1011–1012; see also *Abrams* v. *Johnson,* 521 U. S. 74, 91 (1997). The general terms of the statutory standard "totality of circumstances" require judicial interpretation. For this purpose, the Court has referred to the Senate Report on the 1982 amendments to the Voting Rights Act, which identifies factors typically relevant to a §2 claim, including:

> "the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group . . . ; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value." *Gingles, supra,* at 44–45 (citing S. Rep. No. 97–417 (1982) (hereinafter Senate Report); pinpoint citations omitted).

Another relevant consideration is whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area. *De Grandy, supra,* at 1000.

The District Court's determination whether the §2 requirements are satisfied must be upheld unless clearly erroneous. See *Gingles*, *supra*, at 78–79. Where "the ultimate finding of dilution" is based on "a misreading of the governing law," however, there is reversible error. *De Grandy*, *supra*, at 1022.

B

Appellants argue that the changes to District 23 diluted the voting rights of Latinos who remain in the district. Specifically, the redrawing of lines in District 23 caused the Latino share of the citizen voting-age population to drop from 57.5% to 46%. The District Court recognized that "Latino voting strength in Congressional District 23 is, unquestionably, weakened under Plan 1374C." *Session*, 298 F. Supp. 2d, at 497. The question is whether this weakening amounts to vote dilution.

To begin the *Gingles* analysis, it is evident that the second and third *Gingles* preconditions—cohesion among the minority group and bloc voting among the majority population—are present in District 23. The District Court found "racially polarized voting" in south and west Texas, and indeed "throughout the State." *Session*, *supra*, at 492–493. The polarization in District 23 was especially severe: 92% of Latinos voted against Bonilla in 2002, while 88% of non-Latinos voted for him. App. 134, Table 20 (expert Report of Allan J. Lichtman on Voting-Rights Issues in Texas Congressional Redistricting (Nov. 14, 2003) (hereinafter Lichtman Report)). Furthermore, the projected results in new District 23 show that the Anglo citizen voting-age majority will often, if not always, prevent Latinos from electing the candidate of their choice in the district. *Session*, *supra*, at 496–497. For all these reasons, appellants demonstrated sufficient minority cohesion and majority bloc voting to meet the second and third *Gingles* requirements.

The first *Gingles* factor requires that a group be "sufficiently large and geographically compact to constitute a ma-

jority in a single-member district." 478 U. S., at 50. Latinos in District 23 could have constituted a majority of the citizen voting-age population in the district, and in fact did so under Plan 1151C. Though it may be possible for a citizen voting-age majority to lack real electoral opportunity, the Latino majority in old District 23 did possess electoral opportunity protected by § 2.

While the District Court stated that District 23 had not been an effective opportunity district under Plan 1151C, it recognized the district was "moving in that direction." *Session*, 298 F. Supp. 2d, at 489. Indeed, by 2002 the Latino candidate of choice in District 23 won the majority of the district's votes in 13 out of 15 elections for statewide officeholders. *Id.*, at 518 (Ward, J., concurring in part and dissenting in part). And in the congressional race, Bonilla could not have prevailed without some Latino support, limited though it was. State legislators changed District 23 specifically because they worried that Latinos would vote Bonilla out of office. *Id.*, at 488.

Furthermore, to the extent the District Court suggested that District 23 was not a Latino opportunity district in 2002 simply because Bonilla prevailed, see *id.*, at 488, 495, it was incorrect. The circumstance that a group does not win elections does not resolve the issue of vote dilution. We have said that "the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *De Grandy*, 512 U. S., at 1014, n. 11. In old District 23 the increase in Latino voter registration and overall population, *Session*, 298 F. Supp. 2d, at 523 (Ward, J., concurring in part and dissenting in part), the concomitant rise in Latino voting power in each successive election, the near-victory of the Latino candidate of choice in 2002, and the resulting threat to the Bonilla incumbency, were the very reasons that led the State to redraw the district lines. Since the redistricting prevented the immediate success of the emergent Latino majority in District

23, there was a denial of opportunity in the real sense of that term.

Plan 1374C's version of District 23, by contrast, "is unquestionably not a Latino opportunity district." *Id.*, at 496. Latinos, to be sure, are a bare majority of the voting-age population in new District 23, but only in a hollow sense, for the parties agree that the relevant numbers must include citizenship. This approach fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates. In sum, appellants have established that Latinos could have had an opportunity district in District 23 had its lines not been altered and that they do not have one now.

Considering the district in isolation, the three *Gingles* requirements are satisfied. The State argues, nonetheless, that it met its § 2 obligations by creating new District 25 as an offsetting opportunity district. It is true, of course, that "States retain broad discretion in drawing districts to comply with the mandate of § 2." *Shaw* v. *Hunt*, 517 U. S. 899, 917, n. 9 (1996) *(Shaw II)*. This principle has limits, though. The Court has rejected the premise that a State can always make up for the less-than-equal opportunity of some individuals by providing greater opportunity to others. See *id.*, at 917 ("The vote-dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State"). As set out below, these conflicting concerns are resolved by allowing the State to use one majority-minority district to compensate for the absence of another only when the racial group in each area had a § 2 right and both could not be accommodated.

As to the first *Gingles* requirement, it is not enough that appellants show the possibility of creating a majority-minority district that would include the Latinos in District 23. See *Shaw II*, *supra*, at 917, n. 9 (rejecting the idea that "a § 2 plaintiff has the right to be placed in a majority-minority district once a violation of the statute is shown"). If the inclusion of the plaintiffs would necessitate the exclu-

sion of others, then the State cannot be faulted for its choice. That is why, in the context of a challenge to the drawing of district lines, "the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *De Grandy*, *supra*, at 1008.

The District Court found that the current plan contains six Latino opportunity districts and that seven reasonably compact districts could not be drawn. Appellant GI Forum presented a plan with seven majority-Latino districts, but the District Court found these districts were not reasonably compact, in part because they took in "disparate and distant communities." *Session*, *supra*, at 491–492, and n. 125. While there was some evidence to the contrary, the court's resolution of the conflicting evidence was not clearly erroneous.

A problem remains, though, for the District Court failed to perform a comparable compactness inquiry for Plan 1374C as drawn. *De Grandy* requires a comparison between a challenger's proposal and the "existing number of reasonably compact districts." 512 U. S., at 1008. To be sure, § 2 does not forbid the creation of a noncompact majority-minority district. *Bush* v. *Vera*, 517 U. S., at 999 (KENNEDY, J., concurring). The noncompact district cannot, however, remedy a violation elsewhere in the State. See *Shaw II*, *supra*, at 916 (unless "the district contains a 'geographically compact' population" of the racial group, "where that district sits, 'there neither has been a wrong nor can be a remedy'" (quoting *Growe*, 507 U. S., at 41)). Simply put, the State's creation of an opportunity district for those without a § 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right. And since there is no § 2 right to a district that is not reasonably compact, see *Abrams*, 521 U. S., at 91–92, the creation of a noncompact

district does not compensate for the dismantling of a compact opportunity district.

THE CHIEF JUSTICE claims compactness should be only a factor in the analysis, see *post*, at 507 (opinion concurring in part, concurring in judgment in part, and dissenting in part), but his approach comports neither with our precedents nor with the nature of the right established by §2. *De Grandy* expressly stated that the first *Gingles* prong looks only to the number of "reasonably compact districts." 512 U. S., at 1008. *Shaw II*, moreover, refused to consider a noncompact district as a possible remedy for a §2 violation. 517 U. S., at 916. It is true *Shaw II* applied this analysis in the context of a State's using compliance with §2 as a defense to an equal protection challenge, but the holding was clear: A State cannot remedy a §2 violation through the creation of a noncompact district. *Ibid.* *Shaw II* also cannot be distinguished based on the relative location of the remedial district as compared to the district of the alleged violation. The remedial district in *Shaw II* had a 20% overlap with the district the plaintiffs sought, but the Court stated "[w]e do not think this degree of incorporation could mean [the remedial district] substantially addresses the §2 violation." *Id.*, at 918; see also *De Grandy*, *supra*, at 1019 (expressing doubt about the idea that even within the same county, vote dilution in half the county could be compensated for in the other half). The overlap here is not substantially different, as the majority of Latinos who were in the old District 23 are still in the new District 23, but no longer have the opportunity to elect their candidate of choice.

Apart from its conflict with *De Grandy* and *Shaw II*, THE CHIEF JUSTICE's approach has the deficiency of creating a one-way rule whereby plaintiffs must show compactness but States need not (except, it seems, when using §2 as a defense to an equal protection challenge). THE CHIEF JUSTICE appears to accept that a plaintiff, to make out a §2 violation,

must show he or she is part of a racial group that could form a majority in a reasonably compact district. *Post*, at 505. If, however, a noncompact district cannot make up for the lack of a compact district, then this is equally true whether the plaintiff or the State proposes the noncompact district.

The District Court stated that Plan 1374C created "six *Gingles* Latino" districts, *Session*, 298 F. Supp. 2d, at 498, but it failed to decide whether District 25 was reasonably compact for §2 purposes. It recognized there was a 300-mile gap between the Latino communities in District 25, and a similarly large gap between the needs and interests of the two groups. *Id.*, at 502. After making these observations, however, it did not make any finding about compactness. *Id.*, at 502–504. It ruled instead that, despite these concerns, District 25 would be an effective Latino opportunity district because the combined voting strength of both Latino groups would allow a Latino-preferred candidate to prevail in elections. *Ibid.* The District Court's general finding of effectiveness cannot substitute for the lack of a finding on compactness, particularly because the District Court measured effectiveness simply by aggregating the voting strength of the two groups of Latinos. *Id.*, at 503–504. Under the District Court's approach, a district would satisfy §2 no matter how noncompact it was, so long as all the members of a racial group, added together, could control election outcomes.

The District Court did evaluate compactness for the purpose of deciding whether race predominated in the drawing of district lines. The Latinos in the Rio Grande Valley and those in Central Texas, it found, are "disparate communities of interest," with "differences in socio-economic status, education, employment, health, and other characteristics." *Id.*, at 512. The court's conclusion that the relative smoothness of the district lines made the district compact, despite this combining of discrete communities of interest, is inapposite

because the court analyzed the issue only for equal protection purposes. In the equal protection context, compactness focuses on the contours of district lines to determine whether race was the predominant factor in drawing those lines. See *Miller* v. *Johnson*, 515 U. S. 900, 916–917 (1995). Under §2, by contrast, the injury is vote dilution, so the compactness inquiry embraces different considerations. "The first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district." *Vera*, 517 U. S., at 997 (KENNEDY, J., concurring); see also *Abrams*, 521 U. S., at 111 (BREYER, J., dissenting) (compactness to show a violation of equal protection, "which concerns the shape or boundaries of a district, differs from §2 compactness, which concerns a minority group's compactness"); *Shaw II*, *supra*, at 916 (the inquiry under §2 is whether "the minority group is geographically compact" (internal quotation marks omitted)).

While no precise rule has emerged governing §2 compactness, the "inquiry should take into account 'traditional districting principles such as maintaining communities of interest and traditional boundaries.'" *Abrams*, *supra*, at 92 (quoting *Vera*, 517 U. S., at 977 (plurality opinion)); see also *id.*, at 979 (A district that "reaches out to grab small and apparently isolated minority communities" is not reasonably compact). The recognition of nonracial communities of interest reflects the principle that a State may not "assum[e] from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Miller*, *supra*, at 920 (quoting *Shaw* v. *Reno*, 509 U. S. 630, 647 (1993)). In the absence of this prohibited assumption, there is no basis to believe a district that combines two farflung segments of a racial group with disparate interests provides the opportunity that §2 requires or that the first *Gingles* condition contemplates. "The purpose of the Voting Rights Act is to prevent discrimination in

the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Georgia* v. *Ashcroft*, 539 U. S., at 490; cf. *post*, at 511 (opinion of ROBERTS, C. J.). We do a disservice to these important goals by failing to account for the differences between people of the same race.

While the District Court recognized the relevant differences, by not performing the compactness inquiry, it failed to account for the significance of these differences under § 2. In these cases the District Court's findings regarding the different characteristics, needs, and interests of the Latino community near the Mexican border and the one in and around Austin are well supported and uncontested. Legitimate yet differing communities of interest should not be disregarded in the interest of race. The practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals. Compactness is, therefore, about more than "style points," *post*, at 494 (opinion of ROBERTS, C. J.); it is critical to advancing the ultimate purposes of § 2, ensuring minority groups equal "opportunity . . . to participate in the political process and to elect representatives of their choice." 42 U. S. C. § 1973(b). (And if it were just about style points, it is difficult to understand why a plaintiff would have to propose a compact district to make out a § 2 claim.) As witnesses who know the south and west Texas culture and politics testified, the districting in Plan 1374C "could make it more difficult for thinly financed Latino-preferred candidates to achieve electoral success and to provide adequate and responsive representation once elected." *Session*, 298 F. Supp. 2d, at 502; see also *id.*, at 503 (Elected officials from the region "testified that the size and diversity of the newly-configured districts could make it more difficult for the constituents in the Rio Grande Valley to control election outcomes"). We do not question the District Court's finding that the groups' combined voting strength would enable

them to elect a candidate each prefers to the Anglos' candidate of choice. We also accept that in some cases members of a racial group in different areas—for example, rural and urban communities—could share similar interests and therefore form a compact district if the areas are in reasonably close proximity. See *Abrams*, *supra*, at 111–112 (BREYER, J., dissenting). When, however, the only common index is race and the result will be to cause internal friction, the State cannot make this a remedy for a §2 violation elsewhere. We emphasize it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 noncompact for §2 purposes. The mathematical possibility of a racial bloc does not make a district compact.

Since District 25 is not reasonably compact, Plan 1374C contains only five reasonably compact Latino opportunity districts. Plan 1151C, by contrast, created six such districts. The District Court did not find, and the State does not contend, that any of the Latino opportunity districts in Plan 1151C are noncompact. Contrary to THE CHIEF JUSTICE's suggestion, *post*, at 501, moreover, the Latino population in old District 23 is, for the most part, in closer geographic proximity than is the Latino population in new District 25. More importantly, there has been no contention that different pockets of the Latino population in old District 23 have divergent needs and interests, and it is clear that, as set out below, the Latino population of District 23 was split apart particularly because it was becoming so cohesive. The Latinos in District 23 had found an efficacious political identity, while this would be an entirely new and difficult undertaking for the Latinos in District 25, given their geographic and other differences.

Appellants have thus satisfied all three *Gingles* requirements as to District 23, and the creation of new District 25 does not remedy the problem.

C

We proceed now to the totality of the circumstances, and first to the proportionality inquiry, comparing the percentage of total districts that are Latino opportunity districts with the Latino share of the citizen voting-age population. As explained in *De Grandy*, proportionality is "a relevant fact in the totality of circumstances." 512 U. S., at 1000. It does not, however, act as a "safe harbor" for States in complying with §2. *Id.*, at 1017–1018; see also *id.*, at 1025 (O'Connor, J., concurring) (proportionality "is *always* relevant evidence in determining vote dilution, but is *never* itself dispositive"); *id.*, at 1027–1028 (KENNEDY, J., concurring in part and concurring in judgment) (proportionality has "some relevance," though "placing undue emphasis upon proportionality risks defeating the goals underlying the Voting Rights Act"). If proportionality could act as a safe harbor, it would ratify "an unexplored premise of highly suspect validity: that in any given voting jurisdiction . . . , the rights of some minority voters under §2 may be traded off against the rights of other members of the same minority class." *Id.*, at 1019; see also *Shaw II*, 517 U. S., at 916–918.

The State contends that proportionality should be decided on a regional basis, while appellants say their claim requires the Court to conduct a statewide analysis. In *De Grandy*, the plaintiffs "passed up the opportunity to frame their dilution claim in statewide terms." 512 U. S., at 1022. Based on the parties' apparent agreement that the proper frame of reference was the Dade County area, the Court used that area to decide proportionality. *Id.*, at 1022–1023. In these cases, on the other hand, appellants allege an "injury to African American and Hispanic voters throughout the State." Complaint in Civ. Action No. 03C–356 (ED Tex.), pp. 1–2; see also First Amended Complaint in Civ. Action No. 2:03–354 (ED Tex.), pp. 1, 5, 7; Plaintiff's First Amended Complaint in Civ. Action No. 2:03cv354 etc. (ED Tex.), pp. 4–5. The District Court, moreover, expressly considered the state-

wide proportionality argument. As a result, the question of the proper geographic scope for assessing proportionality now presents itself.

We conclude the answer in these cases is to look at proportionality statewide. The State contends that the seven districts in south and west Texas correctly delimit the boundaries for proportionality because that is the only area of the State where reasonably compact Latino opportunity districts can be drawn. This argument, however, misunderstands the role of proportionality. We have already determined, under the first *Gingles* factor, that another reasonably compact Latino district can be drawn. The question now is whether the absence of that additional district constitutes impermissible vote dilution. This inquiry requires an "'intensely local appraisal'" of the challenged district. *Gingles*, 478 U. S., at 79 (quoting *Rogers* v. *Lodge*, 458 U. S. 613, 622 (1982)); see also *Gingles*, *supra*, at 101 (O'Connor, J., concurring in judgment). A local appraisal is necessary because the right to an undiluted vote does not belong to the "minority as a group," but rather to "its individual members." *Shaw II*, *supra*, at 917. And a State may not trade off the rights of some members of a racial group against the rights of other members of that group. See *De Grandy*, *supra*, at 1019; *Shaw II*, *supra*, at 916–918. The question is therefore not "whether line-drawing in the challenged area as a whole dilutes minority voting strength," *post*, at 504 (opinion of ROBERTS, C. J.), but whether line-drawing dilutes the voting strength of the Latinos in District 23.

The role of proportionality is not to displace this local appraisal or to allow the State to trade off the rights of some against the rights of others. Instead, it provides some evidence of whether "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation." 42 U. S. C. § 1973(b). For this purpose, the State's seven-district area is arbitrary. It just as easily could have included six or eight districts. Ap-

pellants have alleged statewide vote dilution based on a statewide plan, so the electoral opportunities of Latinos across the State can bear on whether the lack of electoral opportunity for Latinos in District 23 is a consequence of Plan 1374C's redrawing of lines or simply a consequence of the inevitable "win some, lose some" in a State with racial bloc voting. Indeed, several of the other factors in the totality of circumstances have been characterized with reference to the State as a whole. *Gingles, supra,* at 44–45 (listing Senate Report factors). Particularly given the presence of racially polarized voting—and the possible submergence of minority votes—throughout Texas, it makes sense to use the entire State in assessing proportionality.

Looking statewide, there are 32 congressional districts. The five reasonably compact Latino opportunity districts amount to roughly 16% of the total, while Latinos make up 22% of Texas' citizen voting-age population. (Appellant GI Forum claims, based on data from the 2004 American Community Survey of the U. S. Census Bureau, that Latinos constitute 24.5% of the statewide citizen voting-age population, but as this figure was neither available at the time of the redistricting, nor presented to the District Court, we accept the District Court's finding of 22%.) Latinos are, therefore, two districts shy of proportional representation. There is, of course, no "magic parameter," *De Grandy,* 512 U. S., at 1017, n. 14, and "rough proportionality," *id.,* at 1023, must allow for some deviations. We need not decide whether the two-district deficit in these cases weighs in favor of a §2 violation. Even if Plan 1374C's disproportionality were deemed insubstantial, that consideration would not overcome the other evidence of vote dilution for Latinos in District 23. "[T]he degree of probative value assigned to proportionality may vary with other facts," *id.,* at 1020, and the other facts in these cases convince us that there is a §2 violation.

District 23's Latino voters were poised to elect their candidate of choice. They were becoming more politically active,

with a marked and continuous rise in Spanish-surnamed voter registration. See Lichtman Report, App. 142–143. In successive elections Latinos were voting against Bonilla in greater numbers, and in 2002 they almost ousted him. Webb County in particular, with a 94% Latino population, spurred the incumbent's near defeat with dramatically increased turnout in 2002. See 2004 Almanac 1579. In response to the growing participation that threatened Bonilla's incumbency, the State divided the cohesive Latino community in Webb County, moving about 100,000 Latinos to District 28, which was already a Latino opportunity district, and leaving the rest in a district where they now have little hope of electing their candidate of choice.

The changes to District 23 undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive. Cf. *De Grandy*, *supra*, at 1014 (finding no §2 violation where "the State's scheme would thwart the historical tendency to exclude Hispanics, not encourage or perpetuate it"); *White* v. *Regester*, 412 U. S. 755, 769 (1973) (looking in the totality of the circumstances to whether the proposed districting would "remedy the effects of past and present discrimination against Mexican-Americans, and to bring the community into the full stream of political life of the county and State by encouraging their further registration, voting, and other political activities" (citation and internal quotation marks omitted)). The District Court recognized "the long history of discrimination against Latinos and Blacks in Texas," *Session*, 298 F. Supp. 2d, at 473, and other courts have elaborated on this history with respect to electoral processes:

> "Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process. Devices such as the poll tax, an all-white primary system, and

> restrictive voter registration time periods are an unfortunate part of this State's minority voting rights history. The history of official discrimination in the Texas election process—stretching back to Reconstruction—led to the inclusion of the State as a covered jurisdiction under Section 5 in the 1975 amendments to the Voting Rights Act. Since Texas became a covered jurisdiction, the Department of Justice has frequently interposed objections against the State and its subdivisions." *Vera* v. *Richards*, 861 F. Supp. 1304, 1317 (SD Tex. 1994) (citations omitted).

See also *Vera*, 517 U. S., at 981–982 (plurality opinion); *Regester*, *supra*, at 767–769. In addition, the "political, social, and economic legacy of past discrimination" for Latinos in Texas, *Session*, *supra*, at 492, may well "hinder their ability to participate effectively in the political process," *Gingles*, 478 U. S., at 45 (citing Senate Report factors).

Against this background, the Latinos' diminishing electoral support for Bonilla indicates their belief he was "unresponsive to the particularized needs of the members of the minority group." *Ibid.* (same). In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation. Even if we accept the District Court's finding that the State's action was taken primarily for political, not racial, reasons, *Session*, *supra*, at 508, the redrawing of the district lines was damaging to the Latinos in District 23. The State not only made fruitless the Latinos' mobilization efforts but also acted against those Latinos who were becoming most politically active, dividing them with a district line through the middle of Laredo.

Furthermore, the reason for taking Latinos out of District 23, according to the District Court, was to protect Congressman Bonilla from a constituency that was increasingly voting against him. The Court has noted that incumbency protec-

tion can be a legitimate factor in districting, see *Karcher* v. *Daggett*, 462 U. S., at 740, but experience teaches that incumbency protection can take various forms, not all of them in the interests of the constituents. If the justification for incumbency protection is to keep the constituency intact so the officeholder is accountable for promises made or broken, then the protection seems to accord with concern for the voters. If, on the other hand, incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters. By purposely redrawing lines around those who opposed Bonilla, the state legislature took the latter course. This policy, whatever its validity in the realm of politics, cannot justify the effect on Latino voters. See *Gingles*, *supra*, at 45 (citing Senate Report factor of whether "the policy underlying" the State's action "is tenuous"). The policy becomes even more suspect when considered in light of evidence suggesting that the State intentionally drew District 23 to have a nominal Latino voting-age majority (without a citizen voting-age majority) for political reasons. *Session*, *supra*, at 497. This use of race to create the facade of a Latino district also weighs in favor of appellants' claim.

Contrary to THE CHIEF JUSTICE's suggestion that we are reducing the State's needed flexibility in complying with §2, see *post*, at 506, the problem here is entirely of the State's own making. The State chose to break apart a Latino opportunity district to protect the incumbent congressman from the growing dissatisfaction of the cohesive and politically active Latino community in the district. The State then purported to compensate for this harm by creating an entirely new district that combined two groups of Latinos, hundreds of miles apart, that represent different communities of interest. Under §2, the State must be held accountable for the effect of these choices in denying equal opportu-

nity to Latino voters. Notwithstanding these facts, THE CHIEF JUSTICE places great emphasis on the District Court's statement that "new District 25 is 'a more effective Latino opportunity district than Congressional District 23 had been.'" *Post*, at 493 (quoting *Session*, 298 F. Supp. 2d, at 503). Even assuming this statement, expressed in the context of summarizing witnesses' testimony, qualifies as a finding of the District Court, two points make it of minimal relevance. First, as previously noted, the District Court measured the effectiveness of District 25 without accounting for the detrimental consequences of its compactness problems. Second, the District Court referred only to how effective District 23 "had been," not to how it would operate today, a significant distinction given the growing Latino political power in the district.

Based on the foregoing, the totality of the circumstances demonstrates a §2 violation. Even assuming Plan 1374C provides something close to proportional representation for Latinos, its troubling blend of politics and race—and the resulting vote dilution of a group that was beginning to achieve §2's goal of overcoming prior electoral discrimination—cannot be sustained.

D

Because we hold Plan 1374C violates §2 in its redrawing of District 23, we do not address appellants' claims that the use of race and politics in drawing that district violates the First Amendment and equal protection. We also need not confront appellants' claim of an equal protection violation in the drawing of District 25. The districts in south and west Texas will have to be redrawn to remedy the violation in District 23, and we have no cause to pass on the legitimacy of a district that must be changed. See *Session*, 298 F. Supp. 2d, at 528 (Ward, J., concurring in part and dissenting in part). District 25, in particular, was formed to compensate for the loss of District 23 as a Latino opportunity district, and there is no reason to believe District 25 will remain

in its current form once District 23 is brought into compliance with §2. We therefore vacate the District Court's judgment as to these claims.

IV

Appellants also challenge the changes to district lines in the Dallas area, alleging they dilute African-American voting strength in violation of §2 of the Voting Rights Act. Specifically, appellants contend that an African-American minority effectively controlled District 24 under Plan 1151C, and that §2 entitles them to this district.

Before Plan 1374C was enacted, District 24 had elected Anglo Democrat Martin Frost to Congress in every election since 1978. *Id.*, at 481–482. Anglos were the largest racial group in the district, with 49.8% of the citizen voting-age population, and third largest were Latinos, with 20.8%. State's Exh. 57, App. 339. African-Americans were the second-largest group, with 25.7% of the citizen voting-age population, *ibid.*, and they voted consistently for Frost. The new plan broke apart this racially diverse district, assigning its pieces into several other districts.

Accepting that African-Americans would not be a majority of the single-member district they seek, and that African-Americans do not vote cohesively with Hispanics, *Session*, *supra*, at 484, appellants nonetheless contend African-Americans had effective control of District 24. As the Court has done several times before, we assume for purposes of this litigation that it is possible to state a §2 claim for a racial group that makes up less than 50% of the population. See *De Grandy*, 512 U. S., at 1009; *Voinovich* v. *Quilter*, 507 U. S. 146, 154 (1993); *Gingles*, 478 U. S., at 46–47, n. 12. Even on the assumption that the first *Gingles* prong can accommodate this claim, however, appellants must show they constitute "a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes." *Voinovich*, *supra*, at 158 (emphasis deleted).

The relatively small African-American population can meet this standard, according to appellants, because its members constituted 64% of the voters in the Democratic primary. Since a significant number of Anglos and Latinos voted for the Democrat in the general election, the argument goes, African-American control of the primary translated into effective control of the entire election.

The District Court found, however, that African-Americans could not elect their candidate of choice in the primary. In support of this finding, it relied on testimony that the district was drawn for an Anglo Democrat, the fact that Frost had no opposition in any of his primary elections since his incumbency began, and District 24's demographic similarity to another district where an African-American candidate failed when he ran against an Anglo. *Session*, 298 F. Supp. 2d, at 483–484. "In short, that Anglo Democrats control this district is," according to the District Court, "the most rational conclusion." *Id.*, at 484.

Appellants fail to demonstrate clear error in this finding. In the absence of any contested Democratic primary in District 24 over the last 20 years, no obvious benchmark exists for deciding whether African-Americans could elect their candidate of choice. The fact that African-Americans voted for Frost—in the primary and general elections—could signify he is their candidate of choice. Without a contested primary, however, it could also be interpreted to show (assuming racial bloc voting) that Anglos and Latinos would vote in the Democratic primary in greater numbers if an African-American candidate of choice were to run, especially given Texas' open primary system. The District Court heard trial testimony that would support both explanations, and we cannot say that it erred in crediting the testimony that endorsed the latter interpretation. Compare App. 242–243 (testimony of Tarrant County Precinct Administrator that Frost is the "favored candidate of the African-American community" and that he has gone unopposed in primary challenges

because he "serves [the African-American community's] interests") with *id.*, at 262–264 (testimony of Congresswoman Eddie Bernice Johnson that District 24 was drawn for an Anglo Democrat (Martin Frost, in particular) in 1991 by splitting a minority community), and *id.*, at 277–280 (testimony of State Representative Ron Wilson that African-Americans did not have the ability to elect their preferred candidate, particularly an African-American candidate, in District 24 and that Anglo Democrats in such "influence [d]istricts" were not fully responsive to the needs of the African-American community).

The analysis submitted by appellants' own expert was also inconsistent. Of the three elections for statewide office he examined, in District 24 the African-American candidate of choice would have won one, lost one, and in the third the African-American vote was split. See Lichtman Report, *id.*, at 75–76, 92–96; State's Exh. 20 in Civ. Action No. 2:03–CV–354 (ED Tex.), p. 138; State's Exh. 21 in Civ. Action No. 2:03–CV–354 (ED Tex.). The District Court committed no clear error in rejecting this questionable showing that African-Americans have the ability to elect their candidate of choice in favor of other evidence that an African-American candidate of choice would not prevail. See *Anderson* v. *Bessemer City*, 470 U. S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous").

That African-Americans had influence in the district, *Session*, *supra*, at 485, does not suffice to state a §2 claim in these cases. The opportunity "to elect representatives of their choice," 42 U. S. C. §1973(b), requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice. There is no doubt African-Americans preferred Martin Frost to the Republicans who opposed him. The fact that African-Americans preferred Frost to some others does not, however, make him

their candidate of choice. Accordingly, the ability to aid in Frost's election does not make the old District 24 an African-American opportunity district for purposes of §2. If §2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions. See *Georgia* v. *Ashcroft*, 539 U. S., at 491 (KENNEDY, J., concurring).

Appellants respond by pointing to *Georgia* v. *Ashcroft*, where the Court held that the presence of influence districts is a relevant consideration under §5 of the Voting Rights Act. The inquiry under §2, however, concerns the opportunity "to elect representatives of their choice," 42 U. S. C. §1973(b), not whether a change has the purpose or effect of "denying or abridging the right to vote," §1973c. *Ashcroft* recognized the differences between these tests, 539 U. S., at 478, and concluded that the ability of racial groups to elect candidates of their choice is only one factor under §5, *id.*, at 480. So while the presence of districts "where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process" is relevant to the §5 analysis, *id.*, at 482, the lack of such districts cannot establish a §2 violation. The failure to create an influence district in these cases thus does not run afoul of §2 of the Voting Rights Act.

Appellants do not raise a district-specific political gerrymandering claim against District 24. Even if the claim were cognizable as part of appellants' statewide challenge, it would be unpersuasive. Just as for the statewide claim, appellants would lack any reliable measure of partisan fairness. JUSTICE STEVENS suggests the burden on representational rights can be measured by comparing the success of Democrats in old District 24 with their success in the new districts they now occupy. *Post*, at 475–476 (opinion concurring in part and dissenting in part). There is no reason, however, why the old district has any special claim to fairness. In fact, old District 24, no less than the old redistricting plan as

a whole, was formed for partisan reasons. See *Session*, 298 F. Supp. 2d, at 484; see also *Balderas*, App. E to Juris. Statement 208a. Furthermore, JUSTICE STEVENS' conclusion that the State has not complied with § 5 of the Voting Rights Act, *post*, at 478–481—effectively overruling the Attorney General without briefing, argument, or a lower court opinion on the issue—does not solve the problem of determining a reliable measure of impermissible partisan effect.

* * *

We reject the statewide challenge to Texas' redistricting as an unconstitutional political gerrymander and the challenge to the redistricting in the Dallas area as a violation of § 2 of the Voting Rights Act. We do hold that the redrawing of lines in District 23 violates § 2 of the Voting Rights Act. The judgment of the District Court is affirmed in part, reversed in part, and vacated in part, and the cases are remanded for further proceedings.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BREYER joins as to Parts I and II, concurring in part and dissenting in part.

This is a suit in which it is perfectly clear that judicially manageable standards enable us to decide the merits of a statewide challenge to a political gerrymander. Applying such standards, I shall explain why the wholly unnecessary replacement of the neutral plan fashioned by the three-judge court in *Balderas* v. *Texas*, Civ. Action No. 6:01CV158 (ED Tex., Nov. 14, 2001) *(per curiam)* (Plan 1151C or *Balderas* Plan) with Plan 1374C, which creates districts with less compact shapes, violates the Voting Rights Act of 1965, and fragments communities of interest—all for purely partisan purposes—violated the State's constitutional duty to govern impartially. Prior misconduct by the Texas Legislature neither excuses nor justifies that violation. Accordingly, while I join the Court's decision to invalidate District 23, I

would hold that Plan 1374C is entirely invalid and direct the District Court to reinstate Plan 1151C. Moreover, as I shall explain, even if the remainder of the plan were valid, the cracking of *Balderas* District 24 would still be unconstitutional.

I

The maintenance of existing district boundaries is advantageous to both voters and candidates. Changes, of course, must be made after every census to equalize the population of each district or to accommodate changes in the size of a State's congressional delegation. Similarly, changes must be made in response to a finding that a districting plan violates §2 or §5 of the Voting Rights Act, 42 U. S. C. §§1973, 1973c. But the interests in orderly campaigning and voting, as well as in maintaining communication between representatives and their constituents, underscore the importance of requiring that any decision to redraw district boundaries—like any other state action that affects the electoral process—must, at the very least, serve some legitimate governmental purpose. See, *e. g.*, *Burdick* v. *Takushi*, 504 U. S. 428, 434, 440 (1992); *id.*, at 448–450 (KENNEDY, J., joined by Blackmun and STEVENS, JJ., dissenting). A purely partisan desire "to minimize or cancel out the voting strength of racial or political elements of the voting population," *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965), is not such a purpose. Because a desire to minimize the strength of Texas Democrats was the sole motivation for the adoption of Plan 1374C, see *Session* v. *Perry*, 298 F. Supp. 2d 451, 470, 472 (ED Tex. 2004) *(per curiam)*, the plan cannot withstand constitutional scrutiny.

The districting map that Plan 1374C replaced, Plan 1151C, was not only manifestly fair and neutral, it may legitimately be described as a milestone in Texas' political history because it put an end to a long history of Democratic misuse of power in that State. For decades after the Civil War, the political party associated with the former Commander in

Chief of the Union Army attracted the support of former slaves and a handful of "carpetbaggers," but had no significant political influence in Texas. The Democrats maintained their political power by excluding black voters from participating in primary elections, see, *e. g.*, *Smith* v. *Allwright*, 321 U. S. 649, 656–661 (1944), by the artful management of multimember electoral schemes, see, *e. g.*, *White* v. *Regester*, 412 U. S. 755, 765–770 (1973), and, most recently, by outrageously partisan gerrymandering, see *ante*, at 410–411 (opinion of KENNEDY, J.); *Bush* v. *Vera*, 517 U. S. 952, 987–990 (1996) (appendixes in plurality opinion), *id.*, at 1005–1007, 1042–1045 (STEVENS, J., dissenting). Unfortunately, some of these tactics are not unique to Texas Democrats; the apportionment scheme they devised in the 1990's is only one example of the excessively gerrymandered districting plans that parties with control of their States' governing bodies have implemented in recent years. See, *e. g.*, *Cox* v. *Larios*, 542 U. S. 947, 947–950 (2004) (STEVENS, J., joined by BREYER, J., concurring) (Democratic gerrymander in Georgia); *Vieth* v. *Jubelirer*, 541 U. S. 267, 272 (2004) (plurality opinion); *id.*, at 342 (STEVENS, J., dissenting) (Republican gerrymander in Pennsylvania); *Karcher* v. *Daggett*, 462 U. S. 725, 744 (1983) (Democratic gerrymander in New Jersey); *Badham* v. *Eu*, 694 F. Supp. 664, 666 (ND Cal. 1988), summarily aff'd, 488 U. S. 1024 (1989) (Democratic gerrymander in California).

Despite the Texas Democratic Party's sordid history of manipulating the electoral process to perpetuate its stranglehold on political power, the Texas Republican Party managed to become the State's majority party by 2002. If, after finally achieving political strength in Texas, the Republicans had adopted a new plan in order to remove the excessively partisan Democratic gerrymander of the 1990's, the decision to do so would unquestionably have been supported by a neutral justification. But that is not what happened. Instead, as the following discussion of the relevant events that

transpired in Texas following the release of the 2000 census data demonstrates, Texas Republicans abandoned a neutral apportionment map for the sole purpose of manipulating district boundaries to maximize their electoral advantage and thus create their own impermissible stranglehold on political power.

By 2001, Texas Republicans had overcome many of the aforementioned tactics designed to freeze the Democrats' status as the State's dominant party, and Republicans controlled the governorship and the State Senate. Democrats, however, continued to constitute a majority of the State House of Representatives. In March of that year, the results of the 2000 decennial census revealed that, as a result of its population growth, Texas was entitled to two additional seats in the United States House of Representatives, bringing the size of the Texas congressional delegation to 32. Texas, therefore, was required to draw 32 equipopulous districts to account for its additional representation and to comply with the one-person, one-vote mandate of Article I, § 2, see, *e. g.*, *Karcher*, 462 U. S. 725. Under Texas law, the Texas Legislature was required to draw these new districts. See *Session*, 298 F. Supp. 2d, at 457–458.

The Texas Legislature, divided between a Republican Senate and a Democratic House, did not reach agreement on a new congressional map in the regular legislative session, and Governor Rick Perry declined to call a special session. Litigation in the Texas state courts also failed to result in a plan, as the Texas Supreme Court vacated the map created by a state trial judge. See *Perry* v. *Del Rio*, 67 S. W. 3d 85 (2001). This left a three-judge Federal District Court in the Eastern District of Texas with "'the unwelcome obligation of performing in the legislature's stead.'" *Balderas* v. *Texas*, Civ. Action No. 6:01CV158 (Nov. 14, 2001) *(per curiam)*, App. E to Juris. Statement in No. 05–276, p. 202a (hereinafter App. to Juris. Statement) (quoting *Connor* v. *Finch*, 431 U. S. 407, 415 (1977)).

After protracted proceedings, which included the testimony of an impartial expert as well as representatives of interested groups supporting different plans, the court prepared its own plan. "Conscious that the primary responsibility for drawing congressional districts is given to political branches of government, and hesitant to 'und[o] the work of one political party for the benefit of another,' the three-judge *Balderas* court sought to apply 'only "neutral" redistricting standards' when drawing Plan 1151C." *Ante*, at 412 (opinion of KENNEDY, J.) (quoting *Henderson* v. *Perry*, 399 F. Supp. 2d 756, 768 (ED Tex. 2005)). As the court explained, it started with a blank map of Texas, drew in the existing districts protected by the Voting Rights Act, located the new Districts 31 and 32 where the population growth that produced them had occurred, and then applied the neutral criteria of "compactness, contiguity, and respecting county and municipal boundaries." App. to Juris. Statement 205a. See *id.*, at 206a–209a. The District Court purposely "eschewed an effort to treat old lines as an independent locator," and concluded that its plan had done much "to end most of the below-the-surface 'ripples' of the 1991 plan and the myriad of submissions before us. For example, the patently irrational shapes of Districts 5 and 6 under the 1991 plan, widely cited as the most extreme but successful gerrymandering in the country, are no more." *Id.*, at 207a–208a.

At the conclusion of this process, the court believed that it had fashioned a map that was "likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state." *Id.*, at 209a. Indeed, reflecting the growing strength of the Republican Party, the District Court's plan, Plan 1151C, offered that party an advantage in 20 of the 32 congressional seats. See *Session*, 298 F. Supp. 2d, at 471 (describing Plan 1151C). The State's expert in this litigation testified that the *Balderas* Plan was not biased in favor of Democrats and that it was "[m]aybe slightly" biased in favor of Republicans. App. 224 (deposi-

tion of Ronald Keith Gaddie, Ph.D.). Although groups of Latino voters challenged Plan 1151C on appeal, neither major political party did so, and the State of Texas filed a motion asking this Court to affirm the District Court's judgment, which we did, *Balderas* v. *Texas*, 536 U. S. 919 (2002).

In the 2002 congressional elections, however, Republicans were not able to capitalize on the advantage that the *Balderas* Plan had provided them. A number of Democratic incumbents were able to attract the votes of ticket-splitters (individuals who voted for candidates from one party in statewide elections and for a candidate from a different party in congressional elections), and thus won elections in some districts that favored Republicans. As a result, Republicans carried only 15 of the districts drawn by the *Balderas* court.[1]

While the Republicans did not do as well as they had hoped in elections for the United States House of Representatives, they made gains in the Texas House of Representatives and won a majority of seats in that body. This gave Texas Republicans control over both bodies of the state legislature, as well as the Governor's mansion, for the first time since Reconstruction.

With full control of the State's legislative and executive branches, the Republicans "decided to redraw the state's

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[1] It was apparently these electoral results that later caused the District Court to state that "the practical effect" of Plan 1151C "was to leave the 1991 Democratic Party gerrymander largely in place as a 'legal' plan." *Henderson* v. *Perry*, 399 F. Supp. 2d 756, 768 (ED Tex. 2005); see *id.*, at 768, n. 52. But the existence of ticket-splitting voters hardly demonstrates that Plan 1151C was biased in favor of Democrats. Instead, as noted above, even the State's expert in this litigation concluded that Plan 1151C was, if anything, biased in favor of Republicans. Nor do the circumstances surrounding the replacement of Plan 1151C suggest that the legislature was motivated by a misimpression that Plan 1151C was unfair to Republicans, and accordingly should be replaced with a more equitable map. Rather, as discussed in detail below, it is clear that the sole motivation for enacting a new districting map was to maximize Republican advantage.

congressional districts solely for the purpose of seizing between five and seven seats from Democratic incumbents." *Session*, 298 F. Supp. 2d, at 472 (internal quotation marks omitted). According to former Lieutenant Governor Bill Ratliff, a highly regarded Republican member of the State Senate, "political gain for the Republicans was 110% of the motivation for the Plan, . . . it was 'the entire motivation.'" *Id.*, at 473 (quoting trial transcript). Or, as the District Court stated in the first of its two decisions in this litigation, "[t]here is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage." *Id.*, at 470. See also *ante*, at 412 (opinion of KENNEDY, J.) (quoting District Court's conclusion). Indeed, as the State itself argued before the District Court: "The overwhelming evidence demonstrated that partisan gain was the motivating force behind the decision to redistrict in 2003." State Defendants' Post-Trial Brief in No. 2:03–CV–354 (ED Tex.), p. 51 (hereinafter State Post-Trial Brief).

This desire for political gain led to a series of dramatic confrontations between Republicans and Democrats, and ultimately resulted in the adoption of a plan that violated the Voting Rights Act. The legislature did not pass a new map in the regular 2003 session, in part because Democratic House members absented themselves and thus denied the body a quorum. Governor Perry then called a special session to take up congressional redistricting—the same step he had declined to take in 2001 after the release of the decennial census figures, when Republicans lacked a majority in the House. During the first special session, the House approved a new congressional map, but the Senate's longstanding tradition requiring two-thirds of that body to support a measure before the full Senate will consider it allowed Democrats to block the plan.

Lieutenant Governor Dewhurst then announced that he would suspend operation of the two-thirds rule in any future

special session considering congressional redistricting. Nonetheless, in a second special session, Senate Democrats again prevented the passage of a new districting map by leaving the State and depriving the Senate of a quorum. When a lone Senate Democrat returned to Texas, Governor Perry called a third special session to consider congressional redistricting.

During that third special session, the State Senate and the State House passed maps that would have apparently avoided any violation of the Voting Rights Act because they would have, *inter alia*, essentially preserved *Balderas* District 23, a majority-Latino district in southwest Texas, and *Balderas* District 24, a majority-minority district in the Dallas-Fort Worth area, where black voters constituted a significant majority of voters in the Democratic primary and usually elected their candidate of choice in the general election. Representative Phil King, the redistricting legislation's chief sponsor in the Texas House, had previously proposed fragmenting District 24, but, after lawyers reviewed the map, King expressed concern that redrawing District 24 might violate the Voting Rights Act, and he drafted a new map that left District 24 largely unchanged.

Nonetheless, the conferees seeking to reconcile the House and Senate plans produced a map that, as part of its goal of maximizing Republican political advantage, significantly altered both Districts 23 and 24 as they had existed in the *Balderas* Plan. *Balderas* District 23 was extended north to take in roughly 100,000 new people who were predominately Anglo and Republican, and was also moved west, thus splitting Webb County and the city of Laredo, and pushing roughly 100,000 people who were predominately Latino and Democratic into an adjacent district. *Session*, 298 F. Supp. 2d, at 488–489. Black voters who previously resided in *Balderas* District 24 were fragmented into five new districts, each of which is predominately Anglo and Republican. See App. 104–106. Representative King testified at trial that

District 24 was cracked even though cracking the district was not "'the path of least resistance'" in terms of avoiding Voting Rights Act liability because leaving *Balderas* District 24 intact would not "accomplish our political objectives." State Post-Trial Brief 51–52 (quoting transcript). This map was ultimately enacted into law as Plan 1374C.

The overall effect of Plan 1374C was to shift more than *eight million* Texans into new districts, and to split more counties into more pieces than the *Balderas* Plan. Moreover, the 32 districts in Plan 1374C are, on average, much less compact under either of two standard measures than their counterparts had been under the *Balderas* Plan. See App. 177–178 (expert report of Professor Gaddie).[2]

Numerous parties filed suit in federal court challenging Plan 1374C on the grounds that it violated §2 of the Voting Rights Act and that it constituted an unconstitutional partisan gerrymander. A three-judge panel—two of whom also were members of the *Balderas* court—rejected these challenges, over Judge Ward's partial dissent on the §2 claims. See *Session*, 298 F. Supp. 2d 451. Responding to plaintiffs' appeals, we remanded for reconsideration in light of *Vieth*, 541 U. S. 267. See 543 U. S. 941 (2004).

In a characteristically thoughtful opinion written by Judge Higginbotham, the District Court again rejected all challenges to the constitutionality of Plan 1374C. See *Henderson*, 399 F. Supp. 2d 756. It correctly found that the Constitution does not prohibit a state legislature from redrawing congressional districts in the middle of a census cycle, see *id.*, at 766, and it also correctly recognized that this Court has not yet endorsed clear standards for judging the validity of partisan gerrymanders, see *id.*, at 760–762. Because the

[2] These two standard measures of compactness are the perimeter-to-area score, which compares the relative length of the perimeter of a district to its area, and the smallest circle score, which compares the ratio of space in the district to the space in the smallest circle that could encompass the district. App. 178.

District Court's original decision, and its reconsideration of the case in the light of the several opinions in *Vieth*, are successive chapters in the saga that began with *Balderas*, it is appropriate to quote this final comment from that opinion before addressing the principal question that is now presented. The *Balderas* court concluded:

> "Finally, to state directly what is implicit in all that we have said: political gerrymandering, a purely partisan exercise, is inappropriate for a federal court drawing a congressional redistricting map. Even at the hands of a legislative body, political gerrymandering is much a bloodfeud, in which revenge is exacted by the majority against its rival. We have left it to the political arena, as we must and wisely should. We do so because our role is limited and not because we see gerrymandering as other than what it is: an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good." App. to Juris. Statement 209a–210a (footnote omitted).

II

The unique question of law that is raised in this appeal is one that the Court has not previously addressed. That narrow question is whether it was unconstitutional for Texas to replace a lawful districting plan "in the middle of a decade, for the sole purpose of maximizing partisan advantage." Juris. Statement in No. 05–276, p. i. This question is both different from, and simpler than, the principal question presented in *Vieth*, in which the "'lack of judicially discoverable and manageable standards'" prevented the plurality from deciding the merits of a statewide challenge to a political gerrymander. 541 U. S., at 277–278.

As the State points out, "in every political-gerrymandering claim the Court has considered, the focus has been on the *map* itself, not on the decision to create the map in the first

place." Brief for State Appellees 33. In defense of the map itself, rather than the basic decision whether to draw the map in the first place, the State notes that Plan 1374C's district borders frequently follow county lines and other neutral criteria. At what the State describes as the relevant "level of granularity," the State correctly points out that appellants have not even attempted to argue that every district line was motivated solely for partisan gain. *Ibid.* See also *ante*, at 417 (opinion of KENNEDY, J.) (noting that "partisan aims did not guide every line" in Plan 1374C). Indeed, the multitude of "granular" decisions that are made during redistricting was part of why the *Vieth* plurality concluded, in the context of a statewide challenge to a redistricting plan promulgated in response to a legal obligation to redistrict, that there are no manageable standards to govern whether the predominant motivation underlying the entire redistricting map was partisan. See 541 U. S., at 285. But see *id.*, at 355 (BREYER, J., dissenting) (arguing that there are judicially manageable standards to assess statewide districting challenges even when a plan is enacted in response to a legal obligation to redistrict).

Unlike *Vieth*, the narrow question presented by the statewide challenge in this litigation is whether the State's decision to draw the map in the first place, when it was under no legal obligation to do so, was permissible. It is undeniable that identifying the motive for making that basic decision is a readily manageable judicial task. See *Gomillion* v. *Lightfoot*, 364 U. S. 339, 341 (1960) (noting that plaintiffs' allegations, if true, would establish by circumstantial evidence "tantamount for all practical purposes to a mathematical demonstration," that redistricting legislation had been enacted "solely" to segregate voters along racial lines); cf. *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 276–280 (1979) (analyzing whether the purpose of a law was to discriminate against women). Indeed, although the Constitution places no *per se* ban on midcycle redistricting,

a legislature's decision to redistrict in the middle of the census cycle, when the legislature is under no legal obligation to do so, makes the judicial task of identifying the legislature's motive simpler than it would otherwise be. As JUSTICE BREYER has pointed out, "the presence of midcycle redistricting, for any reason, raises a fair inference that partisan machinations played a major role in the map-drawing process." *Vieth*, 541 U. S., at 367 (dissenting opinion).

The conclusion that courts can easily identify the motive for redistricting when the legislature is under no legal obligation to act is reinforced by the record in this very case. The District Court unambiguously identified the sole purpose behind the decision to promulgate Plan 1374C: a desire to maximize partisan advantage. See *Session*, 298 F. Supp. 2d, at 472 ("It was clear from the evidence" that Republicans "'decided to redraw the state's congressional districts solely for the purpose of seizing between five and seven seats from Democratic incumbents'" (quoting *amicus* brief filed in *Vieth*)); 298 F. Supp. 2d, at 470 ("There is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage"). It does not matter whether the District Court's description of that purpose qualifies as a specific finding of fact because it is perfectly clear that there is more than ample evidence in the record to support such a finding. This evidence includes: (1) testimony from state legislators; (2) the procedural irregularities described above that accompanied the adoption of Plan 1374C, including the targeted abolition of the longstanding two-thirds rule, designed to protect the rights of the minority party, in the Texas Senate; (3) Plan 1374C's significant departures from the neutral districting criteria of compactness and respect for county lines; (4) the plan's excessive deviations from prior districts, which interfere with the development of strong relationships between Members of Congress and their constituents; and (5) the plan's failure to comply with the Voting Rights Act. Indeed,

the State itself conceded that "[t]he overwhelming evidence demonstrated that partisan gain was the motivating force behind the decision to redistrict in 2003." State Post-Trial Brief 51. In my judgment, there is not even a colorable basis for contending that the relevant intent—in this case a purely partisan intent[3]—cannot be identified on the basis of admissible evidence in the record.[4]

Of course, the conclusions that courts are fully capable of analyzing the intent behind a decision to redistrict, and that desire for partisan gain was the sole factor motivating the decision to redistrict at issue here, do not resolve the question whether proof of a single-minded partisan intent is sufficient to establish a constitutional violation.

On the merits of that question, the State seems to assume that our decision in *Upham* v. *Seamon*, 456 U. S. 37 (1982) *(per curiam)*, has already established the legislature's right to replace a court-ordered plan with a plan drawn for purely

[3] The State suggests that in the process of drawing districts the architects of Plan 1374C frequently followed county lines, made an effort to keep certain entire communities within a given district, and otherwise followed certain neutral principles. But these facts are not relevant to the narrow question presented by these cases: Neutral motivations in the implementation of particular features of the redistricting do not qualify the solely partisan motivation behind the basic decision to adopt an entirely unnecessary plan in the first place.

[4] As noted above, rather than identifying any arguably neutral reasons for adopting Plan 1374C, the record establishes a purely partisan single-minded motivation with unmistakable clarity. Therefore, there is no need at this point to discuss standards that would guide judges in enforcing a rule allowing legislatures to be motivated in part by partisan considerations, but which would impose an "obligation not to apply *too much* partisanship in districting." *Vieth* v. *Jubelirer*, 541 U. S. 267, 286 (2004) (plurality opinion). Deciding that 100% is "too much" is not only a manageable decision, but, as explained below, it is also an obviously correct one. Nonetheless, it is worth emphasizing that courts do, in fact, possess the tools to employ standards that permit legislatures to consider partisanship in the redistricting process, but which do not allow legislatures to use partisanship as the predominant motivation for their actions. See Part IV, *infra*.

partisan purposes. JUSTICE KENNEDY ultimately indulges in a similar assumption, relying on *Upham* for the proposition that "our decisions have assumed that state legislatures are free to replace court-mandated remedial plans by enacting redistricting plans of their own." *Ante*, at 416. JUSTICE KENNEDY recognizes that "[j]udicial respect for legislative plans, however, cannot justify legislative reliance on improper criteria for districting determinations." *Ibid.* But JUSTICE KENNEDY then incorrectly concludes that the singular intent to maximize partisan advantage is not, in itself, such an improper criterion. *Ante*, at 417–418.

This reliance on *Upham* overlooks critical distinctions between the redistricting plan the District Court drew in *Upham* and the redistricting plan the District Court drew in *Balderas*. The judicial plan in *Upham* was created to provide an interim response to an objection by the Attorney General that two contiguous districts in a plan originally drafted by the Texas Legislature violated §5 of the Voting Rights Act. We concluded that, in fashioning its interim remedy, the District Court had erroneously "substituted its own reapportionment preferences for those of the state legislature." 456 U. S., at 40. We held that when judicial relief was necessary because a state legislature had failed "'to reapportion according to federal constitutional [or statutory] requisites in a timely fashion after having had an adequate opportunity to do so,'" the federal court should, as much as possible "'follow the policies and preferences of the State,'" in creating a new map. *Id.*, at 41 (quoting *White* v. *Weiser*, 412 U. S. 783, 794–795 (1973)). We did not suggest that federal courts should honor partisan concerns, but rather identified the relevant state policies as those "'expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution.'" *Upham*, 456 U. S., at 41 (quoting *White*, 412 U. S., at 794–795). Because the District Court in

Upham had exceeded its authority in drawing a new districting map, we made clear that the legislature was authorized to remedy the § 5 violation with a map of its own choosing. See 456 U. S., at 44. *Upham*, then, stands only for the proposition that a state legislature is authorized to redraw a court-drawn congressional districting map when a district court has exceeded its remedial authority. *Upham* does not stand for the proposition that, after a State embraces a valid, neutral court-drawn plan by asking this Court to affirm the opinion creating that plan, the State may then redistrict for the sole purpose of disadvantaging a minority political party.

Indeed, to conclude otherwise would reflect a fundamental misunderstanding of the reason why we have held that state legislatures, rather than federal courts, should have the primary task of creating apportionment plans that comport with federal law. We have so held because "a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies" with the requirements of federal law, *Finch*, 431 U. S., at 414–415, not because we wish to supply a dominant party with an opportunity to disadvantage its political opponents. Indeed, a straightforward application of settled constitutional law leads to the inescapable conclusion that the State may not decide to redistrict if its sole motivation is "to minimize or cancel out the voting strength of racial *or political* elements of the voting population," *Fortson*, 379 U. S., at 439 (emphasis added).

The requirements of the Federal Constitution that limit the State's power to rely exclusively on partisan preferences in drawing district lines are the Fourteenth Amendment's prohibition against invidious discrimination, and the First Amendment's protection of citizens from official retaliation based on their political affiliation. The equal protection component of the Fourteenth Amendment requires actions taken by the sovereign to be supported by some legitimate interest, and further establishes that a bare desire to harm

a politically disfavored group is not a legitimate interest. See, *e. g.*, *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 447 (1985). Similarly, the freedom of political belief and association guaranteed by the First Amendment prevents the State, absent a compelling interest, from "penalizing citizens because of their participation in the electoral process, . . . their association with a political party, or their expression of political views." *Vieth*, 541 U. S., at 314 (KENNEDY, J., concurring in judgment) (citing *Elrod* v. *Burns*, 427 U. S. 347 (1976) (plurality opinion)). These protections embodied in the First and Fourteenth Amendments reflect the fundamental duty of the sovereign to govern impartially. *E. g.*, *Lehr* v. *Robertson*, 463 U. S. 248, 265 (1983); *New York City Transit Authority* v. *Beazer*, 440 U. S. 568 (1979).

The legislature's decision to redistrict at issue in this litigation was entirely inconsistent with these principles. By taking an action for the sole purpose of advantaging Republicans and disadvantaging Democrats, the State of Texas violated its constitutional obligation to govern impartially. "If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated." *Vieth*, 541 U. S., at 312 (KENNEDY, J., concurring in judgment).

III

Relying solely on *Vieth*, JUSTICE KENNEDY maintains that even if legislation is enacted based solely on a desire to harm a politically unpopular minority, this fact is insufficient to establish unconstitutional partisan gerrymandering absent proof that the legislation did in fact burden "the complainants' representative rights." *Ante*, at 418. This conclusion—which clearly goes to the merits, rather than the manageability, of a partisan gerrymandering claim—is not only inconsistent with the constitutional requirement that

state action must be supported by a legitimate interest, but also provides an insufficient response to appellants' claim on the merits.

JUSTICE KENNEDY argues that adopting "the modified sole-intent test" could "encourage partisan excess at the outset of the decade, when a legislature redistricts pursuant to its decennial constitutional duty and is then immune from the charge of sole motivation." *Ante*, at 419, 420. But this would be a problem of the Court's own making. As the decision in *Cox* v. *Larios*, 542 U. S. 947, demonstrates, there are, in fact, readily manageable judicial standards that would allow injured parties to challenge excessive (and unconstitutional) partisan gerrymandering undertaken in response to the release of the decennial census data.[5] See also *Vieth*, 541 U. S., at 328–339 (STEVENS, J., dissenting); *id.*, at 347–353 (SOUTER, J., joined by GINSBURG, J., dissenting); *id.*, at 365–367 (BREYER, J., dissenting). JUSTICE KENNEDY's concern about a heightened incentive to engage in such excessive partisan gerrymandering would be avoided if the Court were willing to enforce those standards.

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[5] See *Larios* v. *Cox*, 300 F. Supp. 2d 1320, 1342–1353 (ND Ga. 2004) *(per curiam)*. In *Cox*, the three-judge District Court undertook a searching review of the entire record in concluding that the population deviations in the state legislative districts created for the Georgia House and Senate after the release of the 2000 census data were not driven by any traditional redistricting criteria, such as compactness or preserving county lines, but were instead driven by the impermissible factors of regional favoritism and the discriminatory protection of Democratic incumbents. If there were no judicially manageable standards to assess whether a State's adoption of a redistricting map was based on valid governmental objectives, we would not have summarily affirmed the decision in *Cox* over the dissent of only one Justice. See 542 U. S. 947; *id.*, at 951 (SCALIA, J., dissenting). In addition, as Part III of the Court's opinion and this Part of my opinion demonstrate, assessing whether a redistricting map has a discriminatory impact on the opportunities for voters and candidates of a particular party to influence the political process is a manageable judicial task.

In any event, JUSTICE KENNEDY's additional requirement that there be proof that the gerrymander did in fact burden the complainants' representative rights is clearly satisfied by the record in this litigation. Indeed, the Court's accurate exposition of the reasons why the changes to District 23 diluted the voting rights of Latinos who remain in that district simultaneously explains why those changes also disadvantaged Democratic voters and thus demonstrates that the effects of a political gerrymander can be evaluated pursuant to judicially manageable standards.

In my judgment the record amply supports the conclusion that Plan 1374C not only burdens the minority party in District 23, but also imposes a severe statewide burden on the ability of Democratic voters and politicians to influence the political process.[6]

In arguing that Plan 1374C does not impose an unconstitutional burden on Democratic voters and candidates, the State takes the position that the plan has resulted in an equitable distribution of political power between the State's two principal political parties. The State emphasizes that in the 2004 elections—held pursuant to Plan 1374C—Republicans won 21 of 32, or 66%, of the congressional seats. That same year, Republicans carried 58% of the vote in statewide elections. Admittedly, these numbers do suggest that the State's congressional delegation was "roughly proportional" to the parties' share of the statewide vote, Brief for State Appellees 44, particularly in light of the fact that our electoral system tends to produce a "seat bonus" in which a party that wins a majority of the vote generally wins an even larger majority of the seats, see Brief for Alan Heslop et al. as *Amici Curiae* (describing the seat bonus phenome-

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[6] Although the burdened group at issue in this litigation consists of Democratic voters and candidates, the partisan gerrymandering analysis throughout this opinion would be equally applicable to any "politically coherent group whose members engaged in bloc voting." *Vieth*, 541 U. S., at 347 (SOUTER, J., joined by GINSBURG, J., dissenting).

non). Cf. *ante*, at 419 (opinion of KENNEDY, J.) (arguing that, compared to the redistricting plan challenged in *Vieth*, "Plan 1374C can be seen as making the party balance more congruent to statewide party power").

That Plan 1374C produced a "roughly proportional" congressional delegation in 2004 does not, however, answer the question whether the plan has a discriminatory effect against Democrats. As appellants point out, whether a districting map is biased against a political party depends upon the bias in the map itself—in other words, it depends upon the opportunities that the map offers each party, regardless of how candidates perform in a given year. And, as the State's expert found in this litigation, Plan 1374C clearly has a discriminatory effect in terms of the opportunities it offers the two principal political parties in Texas. Indeed, that discriminatory effect is severe.

According to Professor Gaddie, the State's expert, Plan 1374C gives Republicans an advantage in 22 of 32 congressional seats. The plaintiffs' expert, Professor Alford, who had been cited favorably by the *Balderas* Court as having applied a "neutral approach" to redistricting in that litigation, App. to Juris. Statement 207a, agreed. He added that, in his view, the only surprise from the 2004 elections was "how far things moved" toward achieving a 22-to-10 pro-Republican split "in a single election year," *id.*, at 226a (declaration of John R. Alford, Ph.D.).[7] But this 22-to-10 advantage does not depend on Republicans winning the 58% share of the statewide vote that they received in 2004. Instead,

[7] In the 2004 congressional elections, Republicans won 21 of the 22 seats that had been designed to favor Republicans in Plan 1374C. One Democratic incumbent, Representative Chet Edwards, narrowly defeated (with 51% of the vote) his nonincumbent Republican challenger in a Republican-leaning district; Edwards outspent his challenger, who lacked strong ties to the principal communities in the district. Republicans are likely to spend more money and find a stronger challenger in 2006, which will create a "very significant chance" of a Republican defeating Edwards. App. to Juris. Statement 224a, 226a.

according to Professor Gaddie, Republicans would be likely to carry 22 of 32 congressional seats if they won only 52% of the statewide vote. App. 216, 229. Put differently, Plan 1374C ensures that, even if the Democratic Party succeeds in convincing 10% of the people who voted for Republicans in the last statewide elections to vote for Democratic congressional candidates,[8] which would constitute a major electoral shift, there is unlikely to be *any* change in the number of congressional seats that Democrats win. Moreover, Republicans would still have an overwhelming advantage if Democrats achieved full electoral parity. According to Professor Gaddie's analysis, Republicans would be likely to carry 20 of the 32 congressional seats even if they only won 50% (or, for that matter, 49%) of the statewide vote. *Id.*, at 216, 229–230. This demonstrates that Plan 1374C is inconsistent with the symmetry standard, a measure social scientists use to assess partisan bias, which is undoubtedly "a reliable standard" for measuring a "burden . . . on the complainants' representative rights," *ante*, at 418 (opinion of KENNEDY, J.).

The symmetry standard "requires that the electoral system treat similarly-situated parties equally, so that each receives the same fraction of legislative seats for a particular vote percentage as the other party would receive if it had received the same percentage." Brief for Gary King et al. as *Amici Curiae* 4–5. This standard is widely accepted by scholars as providing a measure of partisan fairness in electoral systems. See, *e. g.*, Tufte, The Relationship Between Seats and Votes in Two-Party Systems, 67 Am. Pol. Sci. Rev. 540, 542–543 (1973); Gelman & King, Enhancing Democracy Through Legislative Redistricting, 88 Am. Pol. Sci. Rev. 541, 545 (1994); Thompson, Election Time: Normative Implications of Temporal Properties of the Electoral Process in the

[8] If 10% of Republican voters decided to vote for Democratic candidates, and if there were no other changes in voter turnout or preferences, the Republicans' share of the statewide vote would be reduced from 58% to 52%.

United States, 98 Am. Pol. Sci. Rev. 51, 53, and n. 7 (2004); Engstrom & Kernell, Manufactured Responsiveness: The Impact of State Electoral Laws on Unified Party Control of the Presidency and House of Representatives, 1840–1940, 49 Am. J. Pol. Sci. 531, 541 (2005). Like other models that experts use in analyzing vote dilution claims, compliance with the symmetry standard is measured by extrapolating from a sample of known data, see, *e. g.*, *Thornburg* v. *Gingles*, 478 U. S. 30, 53, and n. 20 (1986) (discussing extreme case analysis and bivariate ecological regression analysis). In this litigation, the symmetry standard was not simply proposed by an *amicus* to this Court, it was also used by the expert for plaintiffs and the expert for the State in assessing the degree of partisan bias in Plans 1151C and 1374C. See App. 34–42 (report of Professor Alford); *id.*, at 189–193, 216 (report of Professor Gaddie).

Because, as noted above, Republicans would have an advantage in a significant majority of seats even if the statewide vote were equally distributed between Republicans and Democrats, Plan 1374C constitutes a significant departure from the symmetry standard. By contrast, based on Professor Gaddie's evaluation, the *Balderas* Plan, though slightly biased in favor of Republicans, provided markedly more equitable opportunities to Republicans and Democrats. For example, consistent with the symmetry standard, under Plan 1151C the parties were likely to each take 16 congressional seats if they won 50% of the statewide vote. See App. 216.

Plan 1374C then, clearly has a discriminatory impact on the opportunities that Democratic citizens have to elect candidates of their choice. Moreover, this discriminatory effect cannot be dismissed as *de minimis*. According to the State's expert, if each party receives half the statewide vote, under Plan 1374C the Republicans would carry 62.5% (20) of the congressional seats, whereas the Democrats would win 37.5% (12) of those seats. In other words, at the vote distribution point where a politically neutral map would result in zero

differential in the percentage of seats captured by each party, Plan 1374C is structured to create a 25% differential. When a redistricting map imposes such a significant disadvantage on a politically salient group of voters, the State should shoulder the burden of defending the map. Cf. *Brown* v. *Thomson*, 462 U. S. 835, 842–843 (1983) (holding that the implementation of a redistricting plan for state legislative districts with population deviations over 10% creates a prima facie case of discrimination under the Equal Protection Clause, thus shifting the burden to the State to defend the plan); *Larios* v. *Cox*, 300 F. Supp. 2d 1320, 1339–1340 (ND Ga.) *(per curiam)*, summarily aff'd, 542 U. S. 947 (2004) (same, but further pointing out that the "'ten percent rule'" is not a safe harbor, and concluding that, under the circumstances of the case before it, a state legislative districting plan was unconstitutional even though population deviations were under 10%). At the very least, once plaintiffs have established that the legislature's sole purpose in adopting a plan was partisan—as plaintiffs have established in this action, see Part II, *supra*—such a severe discriminatory effect should be sufficient to meet any additional burden they have to demonstrate that the redistricting map accomplishes its discriminatory purpose.[9]

[9] JUSTICE KENNEDY faults proponents of the symmetry standard for not "providing a standard for deciding how much partisan dominance is too much," *ante*, at 420. But it is this Court, not proponents of the symmetry standard, that has the judicial obligation to answer the question of how much unfairness is too much. It would, of course, be an eminently manageable standard for the Court to conclude that deviations of over 10% from symmetry create a prima facie case of an unconstitutional gerrymander, just as population deviations among districts of more than 10% create such a prima facie case. Or, the Court could conclude that a significant departure from symmetry is one relevant factor in analyzing whether, under the totality of the circumstances, a districting plan is an unconstitutional partisan gerrymander. See n. 11, *infra*. At any rate, proponents of the symmetry standard have provided a helpful (though certainly not talismanic) tool in this type of litigation. While I appreciate JUSTICE KENNEDY's leaving the door open to the use of the standard in future

The bias in Plan 1374C is most striking with regard to its effect on the ability of Democratic voters to elect candidates of their choice, but its discriminatory effect does not end there. Plan 1374C also lessens the influence Democratic voters are likely to be able to exert over Republican lawmakers, thus further minimizing Democrats' capacity to play a meaningful role in the political process.

Even though it "defies political reality to suppose that members of a losing party have as much political influence over . . . government as do members of the victorious party," *Davis* v. *Bandemer*, 478 U. S. 109, 170 (1986) (Powell, J., concurring in part and dissenting in part), the Court has recognized that "the power to influence the political process is not limited to winning elections," *id.*, at 132 (plurality opinion); see also *Georgia* v. *Ashcroft*, 539 U. S. 461, 482 (2003). In assessing whether members of a group whose candidate is defeated at the polls can nonetheless influence the elected representative, it is "important to consider 'the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account.'" *Ibid.* (quoting *Gingles*, 478 U. S., at 100 (O'Connor, J., concurring in judgment)). One justification for majority rule is that elected officials *will* generally "take the minority's interests into account," in part because the majority recognizes that preferences shift and today's minority could be tomorrow's majority. See, *e. g.*, L. Guinier, Tyranny of the Majority 77 (1994); J. Ely, Democracy and Distrust 84 (1980); cf. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), reprinted in 1 Republic of Letters 502 (J. Smith ed. 1995) (arguing that "[t]he great desideratum in Government is . . . to modify the sovereignty as that it may be sufficiently neutral between different parts of the Society" and thus prevent a fixed majority from oppressing the minority). Indeed, this Court has concluded that our

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cases, see *ante*, at 419–420, I believe it is the role of this Court, not social scientists, to determine how much partisan dominance is too much.

system of representative democracy is premised on the assumption that elected officials will seek to represent their constituency as a whole, rather than any dominant faction within that constituency. See *Shaw* v. *Reno*, 509 U. S. 630, 648 (1993).

Plan 1374C undermines this crucial assumption that congressional representatives from the majority party (in this case Republicans) will seek to represent their entire constituency. "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Ibid.* *Shaw*'s analysis of representational harms in the racial gerrymandering context applies with at least as much force in the partisan gerrymandering context because, in addition to the possibility that a representative may believe her job is only to represent the interests of a dominant constituency, a representative may feel more beholden to the cartographers who drew her district than to the constituents who live there. See *Vieth*, 541 U. S., at 329–331 (STEVENS, J., dissenting). In short, Plan 1374C reduces the likelihood that Republican representatives elected from gerrymandered districts will act as vigorous advocates for the needs and interests of Democrats who reside within their districts.

In addition, Plan 1374C further weakens the incentives for members of the majority party to take the interests of the minority party into account because it locks in a Republican congressional majority of 20–22 seats, so long as Republicans achieve at least 49% of the vote. The result of this lock-in is that, according to the State's expert, between 19 and 22 of these Republican seats are safe seats, meaning seats where one party has at least a 10% advantage over the other. See App. 227–228 (expert report of Professor Gaddie). Members of Congress elected from such safe districts need not worry

much about the possibility of shifting majorities, so they have little reason to be responsive to political minorities within their district.[10]

In sum, I think it is clear that Plan 1374C has a severe burden on the capacity of Texas Democrats to influence the political process. Far from representing an example of "one of the most significant acts a State can perform to ensure citizen participation in republican self-governance," *ante*, at 416 (opinion of KENNEDY, J.), the plan guarantees that the

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[10] Safe seats may harm the democratic process in other ways as well. According to one recent article coauthored by a former Chairman of the Federal Election Commission, electoral competition "plainly has a positive effect on the interest and participation of voters in the electoral process." Potter & Viray, Election Reform: Barriers to Participation, 36 U. Mich. J. L. Reform 547, 575 (2003) (hereinafter Potter & Viray); see also L. Guinier, Tyranny of the Majority 85 (1994). The impact of noncompetitive elections in depressing voter turnout is especially troubling in light of the fact that voter participation in the United States lags behind, often well behind, participation rates in other democratic nations. Potter & Viray 575–576, and n. 200. In addition, the creation of safe seats tends to polarize decisionmaking bodies. See, *e. g.*, *Clingman* v. *Beaver*, 544 U. S. 581, 620 (2005) (STEVENS, J., joined by GINSBURG, J., dissenting) (noting that safe districts can "increase the bitter partisanship that has already poisoned some of those [legislative] bodies that once provided inspiring examples of courteous adversary debate and deliberation"); Cox, Partisan Gerrymandering and Disaggregated Redistricting, 2004 S. Ct. Rev. 409, 430 (arguing that "safe seats produce more polarized representatives because, by definition, the median voter in a district that is closely divided between the two major parties is more centrist than the median voter in a district dominated by one party"); Raviv, Unsafe Harbors: One Person, One Vote and Partisan Redistricting, 7 U. Pa. J. Const. L. 1001, 1068 (2005) (arguing that safe districts encourage polarization in decisionmaking bodies because representatives from those districts have to cater only to voters from one party). See generally Issacharoff & Karlan, Where to Draw the Line?: Judicial Review of Political Gerrymanders, 153 U. Pa. L. Rev. 541, 574 (2004) (providing data about the large percentage of safe seats in recent congressional and state legislative elections, and concluding that "[n]on-competitive elections threaten both the legitimacy and the vitality of democratic governance").

Republican-dominated membership of the Texas congressional delegation will remain constant notwithstanding significant pro-Democratic shifts in public opinion. Moreover, the harms Plan 1374C imposes on Democrats are not "hypothetical" or "counterfactual," *ante*, at 420, simply because, in the 2004 elections, Republicans won a share of seats roughly proportional to their statewide voting strength. By creating 19–22 safe Republican seats, Plan 1374C has already harmed Democrats because, as explained above, it significantly undermines the likelihood that Republican lawmakers from those districts will be responsive to the interests of their Democratic constituents. In addition, Democrats will surely have a more difficult time recruiting strong candidates, and mobilizing voters and resources, in these safe Republican districts. Thus, appellants have satisfied any requisite obligation to demonstrate that they have been harmed by the adoption of Plan 1374C.

Furthermore, as discussed in Part II, *supra*, the sole intent motivating the Texas Legislature's decision to replace Plan 1151C with Plan 1374C was to benefit Republicans and burden Democrats. Accordingly, in terms of both its intent and effect, Plan 1374C violates the sovereign's duty to govern impartially.

> "When a State adopts rules governing its election machinery or defining electoral boundaries, those rules must serve the interests of the entire community. If they serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection." *Karcher*, 462 U. S., at 748 (STEVENS, J., concurring) (citation omitted).

Accordingly, even accepting the Court's view that a gerrymander is tolerable unless it in fact burdens the minority's

representative rights, I would hold that Plan 1374C is unconstitutional.[11]

IV

Even if I thought that Plan 1374C were not unconstitutional in its entirety, I would hold that the cracking of District 24—which, under the *Balderas* Plan, was a majority-minority district that consistently elected Democratic Congressman Martin Frost—was unconstitutional. Readily manageable standards enable us to analyze both the purpose and the effect of the "granular" decisions that produced the replacements for District 24. Applying these standards, which I set forth below, I believe it is clear that the manipulation of this district for purely partisan gain violated the First and Fourteenth Amendments.

The same constitutional principles discussed above concerning the sovereign's duty to govern impartially inform the proper analysis for claims that a particular district is an unconstitutional partisan gerrymander. We have on several occasions recognized that a multimember district is subject to challenge under the Fourteenth Amendment if it operates "'to minimize or cancel out the voting strength of racial *or*

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[11] In this litigation expert testimony provided the principal evidence about the effects of the plan that satisfy the test JUSTICE KENNEDY would impose. In my judgment, however, most statewide challenges to an alleged gerrymander should be evaluated primarily by examining these objective factors: (1) the number of people who have been moved from one district to another, (2) the number of districts that are less compact than their predecessors, (3) the degree to which the new plan departs from other neutral districting criteria, including respect for communities of interest and compliance with the Voting Rights Act, (4) the number of districts that have been cracked in a manner that weakens an opposition party incumbent, (5) the number of districts that include two incumbents from the opposite party, (6) whether the adoption of the plan gave the opposition party, and other groups, a fair opportunity to have input in the redistricting process, (7) the number of seats that are likely to be safe seats for the dominant party, and (8) the size of the departure in the new plan from the symmetry standard.

political elements of the voting population.'" *E. g., Gaffney* v. *Cummings*, 412 U. S. 735, 751 (1973) (emphasis added); *Burns* v. *Richardson*, 384 U. S. 73, 88 (1966). There is no constitutionally relevant distinction between the harms inflicted by single-member district gerrymanders that minimize or cancel out the voting strength of a political element of the population and the same harms inflicted by multimember districts. In both situations, the State has interfered with the voter's constitutional right to "engage in association for the advancement of beliefs and ideas," *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 460 (1958).

I recognize that legislatures will always be aware of politics and that we must tolerate some consideration of political goals in the redistricting process. See *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 847 (CA7 1972) (Stevens, J., dissenting). However, I think it is equally clear that, when a plaintiff can prove that a legislature's predominant motive in drawing a particular district was to disadvantage a politically salient group, and that the decision has the intended effect, the plaintiff's constitutional rights have been violated. See *id.*, at 859–860. Indeed, in *Vieth*, five Members of this Court explicitly recognized that extreme partisan gerrymandering violates the Constitution. See 541 U. S., at 307, 312–316 (KENNEDY, J., concurring in judgment); *id.*, at 317–318 (STEVENS, J., dissenting); *id.*, at 343, 347–352 (SOUTER, J., joined by GINSBURG, J., dissenting); *id.*, at 356–357, 366–367 (BREYER, J., dissenting). The other four Justices in *Vieth* stated that they did not disagree with that conclusion. See *id.*, at 292 (plurality opinion). The *Vieth* plurality nonetheless determined that there were no judicially manageable standards to assess partisan gerrymandering claims. *Id.*, at 305–306. However, the following test, which shares some features of the burden-shifting standard for assessing unconstitutional partisan gerrymandering proposed by JUSTICE SOUTER's opinion in *Vieth*, see *id.*, at 348–351, would provide a remedy for at least the most blatant

unconstitutional partisan gerrymanders and would also be eminently manageable.

First, to have standing to challenge a district as an unconstitutional partisan gerrymander, a plaintiff would have to prove that he is either a candidate or a voter who resided in a district that was changed by a new districting plan. See *id.*, at 327–328 (STEVENS, J., dissenting) (discussing *United States* v. *Hays*, 515 U. S. 737 (1995)). See also 541 U. S., at 347–348 (SOUTER, J., joined by GINSBURG, J., dissenting) (citing *Hays*). A plaintiff with standing would then be required to prove both improper purpose and effect.

With respect to the "purpose" portion of the inquiry, I would apply the standard fashioned by the Court in its racial gerrymandering cases. Under the Court's racial gerrymandering jurisprudence, judges must analyze whether plaintiffs have proved that race was the predominant factor motivating a districting decision such that other, race-neutral districting principles were subordinated to racial considerations. If so, strict scrutiny applies, see, *e. g.*, *Vera*, 517 U. S., at 958–959 (plurality opinion), and the State must justify its districting decision by establishing that it was narrowly tailored to serve a compelling state interest, such as compliance with § 2 of the Voting Rights Act, see *King* v. *Illinois Bd. of Elections*, 979 F. Supp. 619 (ND Ill. 1997), summarily aff'd, 522 U. S. 1087 (1998); *Vera*, 517 U. S., at 994 (O'Connor, J., concurring).[12] However, strict scrutiny does not apply merely because race was one motivating factor behind the drawing of a majority-minority district. *Id.*, at 958–959 (plurality opinion); see also *Easley* v. *Cromartie*, 532 U. S. 234, 241 (2001). Applying these standards to the political gerrymandering context, I would hold that, if a plaintiff car-

[12] JUSTICE BREYER has authorized me to state that he agrees with JUSTICE SCALIA that compliance with § 5 of the Voting Rights Act is also a compelling state interest. See *post*, at 518 (opinion concurring in judgment in part and dissenting in part). I, too, agree with JUSTICE SCALIA on this point.

ried her burden of demonstrating that redistricters subordinated neutral districting principles to political considerations and that their predominant motive was to maximize one party's power, she would satisfy the intent prong of the constitutional inquiry.[13] Cf. *Vieth*, 541 U. S., at 349–350 (SOUTER, J., joined by GINSBURG, J., dissenting) (discussing the importance of a district's departures from traditional districting principles in determining whether the district is an unconstitutional gerrymander).

With respect to the effects inquiry, a plaintiff would be required to demonstrate the following three facts: (1) her candidate of choice won election under the old plan; (2) her residence is now in a district that is a safe seat for the opposite party; and (3) her new district is less compact than the old district. The first two prongs of this effects inquiry would be designed to measure whether or not the plaintiff has been harmed, whereas the third prong would be relevant because the shape of the gerrymander has always provided crucial evidence of its character, see *Karcher*, 462 U. S., at 754–758, 762–763 (STEVENS, J., concurring); see also *Vieth*, 541 U. S., at 348 (SOUTER, J., joined by GINSBURG, J., dissenting) (noting that compactness is a traditional districting principle, which "can be measured quantitatively"). Moreover, a safe harbor for more compact districts would allow a newly elected majority to eliminate a prior partisan gerrymander without fear of liability or even the need to devote resources to litigating whether or not the legislature had acted with an impermissible intent.

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[13] If, on the other hand, the State could demonstrate, for example, that the new district was part of a statewide scheme designed to apportion power fairly among politically salient groups, or to enhance the political power of an underrepresented community of interest (such as residents of an economically distressed region), the State would avoid liability even if the results of such statewide districting had predictably partisan effects. See generally *Vieth*, 541 U. S., at 351–352 (SOUTER, J., joined by GINSBURG, J., dissenting) (discussing legitimate interests that a State could posit as a defense to a prima facie case of partisan gerrymandering).

If a plaintiff with standing could meet the intent and effects prong of the test outlined above, that plaintiff would clearly have demonstrated a violation of her constitutional rights. Moreover, I do not think there can be any colorable claim that this test would not be judicially manageable.

Applying this test to the facts of these cases, I think plaintiffs in new Districts 6, 24, 26, and 32—four of the districts in Plan 1374C that replaced parts of *Balderas* District 24—can demonstrate that their constitutional rights were violated by the cracking of *Balderas* District 24. First, I assume that there are plaintiffs who reside in Districts 6, 24, 26, and 32, and whose homes were previously located in *Balderas* District 24.[14] Accordingly, I assume that there are plaintiffs who have standing to challenge the creation of these districts.

Second, plaintiffs could easily satisfy their burden of proving predominant partisan purpose. Indeed, in this litigation, the State has acknowledged that its predominant motivation for cracking District 24 was to achieve partisan gain. See State Post-Trial Brief 51–52 (noting that, in spite of concerns that the cracking of District 24 could lead to Voting Rights Act liability, "[t]he Legislature . . . chose to pursue a political goal of unseating Congressman Frost instead of following a course that might have lowered risks [of such liability]").

The District Court agreed with the State's analysis on this issue. In the District Court, plaintiffs claimed that the creation of District 26 violated the Equal Protection Clause because the decision to create District 26 was motivated by unconstitutional racial discrimination against black voters.

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[14] This assumption is justified based on counsel's undisputed representations at oral argument. See Tr. of Oral Arg. 35. However, if there were any genuine dispute about whether there are plaintiffs whose residences were previously located in *Balderas* District 24, but which are now incorporated into Districts 6, 24, 26, and 32, a remand would be appropriate to allow the District Court to address this issue.

The District Court rejected this argument, concluding that the State's decision to crack *Balderas* District 24 was driven not by racial prejudice, but rather by the political desire to maximize Republican advantage and to "remove Congressman Frost," which required that Frost "lose a large portion of his Democratic constituency, many of whom lived in a predominately Black area of Tarrant County." *Session*, 298 F. Supp. 2d, at 471.

That an impermissible, predominantly partisan, purpose motivated the cracking of former District 24 is further demonstrated by the fact that, in my judgment, this cracking caused Plan 1374C to violate § 5 of the Voting Rights Act, 42 U. S. C. § 1973c. The State's willingness to adopt a plan that violated its legal obligations under the Voting Rights Act, combined with the other indicia of partisan intent in this litigation, is compelling evidence that politics was not simply one factor in the cracking of District 24, but rather that it was an impermissible, predominant factor.

Section 5 of the Voting Rights Act "was intended 'to insure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques.'" *Beer* v. *United States*, 425 U. S. 130, 140–141 (1976) (quoting S. Rep. No. 94–295, p. 19 (1975); alteration in *Beer*). To effectuate this goal, § 5 prevents covered jurisdictions, such as Texas, from making changes to their voting procedures "that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Georgia*, 539 U. S., at 477 (internal quotation marks omitted). In other words, during the redistricting process, covered jurisdictions may not "leave minority voters with less chance to be effective in electing preferred candidates than they were" under the prior districting plan. See *id.*, at 494 (SOUTER, J., dissenting). By cracking *Balderas* District 24, and by not offsetting the loss in black voters' ability to elect preferred

candidates elsewhere, Plan 1374C resulted in impermissible retrogression.

Under the *Balderas* Plan, black Americans constituted a majority of Democratic primary voters in District 24. According to the unanimous report authored by staff attorneys in the Voting Section of the Department of Justice, black voters in District 24 generally voted cohesively, and thus had the ability to elect their candidate of choice in the Democratic primary. Section 5 Recommendation Memorandum 33 (Dec. 12, 2003), available at http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf (as visited June 21, 2006, and available in Clerk of Court's case file). Moreover, the black community's candidates of choice could consistently attract sufficient crossover voting from non-blacks to win the general election, even though blacks did not constitute a majority of voters in the general election. *Id.*, at 33–34. Representative Frost, who is white, was clearly the candidate of choice of the black community in District 24, based on election returns, testimony of community leaders, and "'scorecards'" he received from groups dedicated to advancing the interests of African-Americans. See *id.*, at 35.

As noted above, in Plan 1374C, "the minority community in [*Balderas* District] 24 [was] splintered and submerged into majority Anglo districts in the Dallas-Fort Worth area." *Id.*, at 67. By dismantling one district where blacks had the ability to elect candidates of their choice,[15] and by not offset-

[15] In the decision below, the District Court concluded that black voters did not in fact "control" electoral outcomes in District 24. See *Session* v. *Perry*, 298 F. Supp. 2d 451, 498 (2004). Even assuming, as JUSTICE KENNEDY concludes, see *ante*, at 444–446, that the District Court did not commit reversible error in its analysis of this issue, the lack of "control" might be relevant in analyzing plaintiffs' vote dilution claim under §2, but it is not relevant in evaluating whether Plan 1374C is retrogressive under §5. It is indisputable that, at the very least, *Balderas* District 24 was a strong influence district for black voters, that is, a district where voters of color can "play a substantial, if not decisive, role in the electoral proc-

ting this loss of a district with another district where black voters had a similar opportunity, Plan 1374C was retrogressive, in violation of §5 of the Voting Rights Act. See *id.*, at 31, 67–69.

Notwithstanding the unanimous opinion of the staff attorneys in the Voting Section of the Justice Department that Plan 1374C was retrogressive and that the Attorney General should have interposed an objection, the Attorney General elected to preclear the map, thus allowing it to take effect. We have held that, under the statutory scheme, voters may not directly challenge the Attorney General's decision to preclear a redistricting plan, see *Morris* v. *Gressette*, 432 U. S. 491 (1977), which means that the Attorney General's vigilant enforcement of the Act is critical, and which also means that plaintiffs could not bring a §5 challenge as part of this litigation.[16] However, judges are frequently called upon to consider whether a redistricting plan violates §5, because a covered jurisdiction has the option of seeking to achieve preclearance by either submitting its plan to the Attorney General or filing a declaratory judgment action in the District Court for the District of Columbia, whose judgment is

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ess." *Georgia* v. *Ashcroft*, 539 U. S. 461, 482 (2003). Accordingly, by dismantling *Balderas* District 24, and by failing to create a strong influence district elsewhere, Plan 1374C was retrogressive. See 539 U. S., at 482 (explaining that, in deciding whether a plan is retrogressive, "a court must examine whether a new plan adds or subtracts 'influence districts'").

[16] As JUSTICE KENNEDY explains, see *ante*, at 443–447, plaintiffs did, however, challenge District 24 under §2. I am in substantial agreement with JUSTICE SOUTER's discussion of this issue. See *post*, at 485–490 (opinion concurring in part and dissenting in part). Specifically, I agree with JUSTICE SOUTER that the "50% rule," which finds no support in the text, history, or purposes of §2, is not a proper part of the statutory vote dilution inquiry. For the reasons stated in my analysis of the "unique question of law . . . raised in this appeal," *supra*, at 456, and in this part of my opinion, however, it is so clear that the cracking of District 24 created an unconstitutional gerrymander that I find it unnecessary to address the statutory issue separately.

subject to review by this Court, see, *e. g.*, *Georgia*, 539 U. S. 461. Accordingly, we have the tools to analyze whether a redistricting plan is retrogressive.

Even though the § 5 issue is not directly before this Court, for the reasons stated above, I believe that the cracking of District 24 caused Plan 1374C to be retrogressive. And the fact that the legislature promulgated a retrogressive plan is relevant because it provides additional evidence that the legislature acted with a predominantly partisan purpose. Complying with § 5 is a neutral districting principle, and the legislature's promulgation of a retrogressive redistricting plan buttresses my conclusion that the "legislature subordinated traditional [politically] neutral districting principles . . . to [political] considerations." *Miller* v. *Johnson*, 515 U. S. 900, 916 (1995). This evidence is particularly compelling in light of the State's acknowledgment that "[t]he Legislature . . . chose to pursue a political goal of unseating Congressman Frost instead of following a course that might have lowered risks in the preclearance process." State Post-Trial Brief 52 (citing, *inter alia*, trial testimony of state legislators).

In sum, the record in this litigation makes clear that the predominant motive underlying the fragmentation of *Balderas* District 24 was to maximize Republicans' electoral opportunities and ensure that Congressman Frost was defeated.

Turning now to the effects test I have proposed, plaintiffs in new Districts 6, 24, 26, and 32 could easily meet the three parts of that test because: (1) under the *Balderas* Plan, they lived in District 24 and their candidate of choice (Frost) was the winning candidate; (2) under Plan 1374C, they have been placed in districts that are safe seats for the Republican party, see App. 106 (showing that the Democratic share of the two-party vote in statewide elections from 1996 to 2002 was 40% or less in Districts 6, 24, 26, and 32); and (3) their

new districts are less compact than *Balderas* District 24, see App. 319–320 (compactness scores for districts under the *Balderas* Plan and Plan 1374C).[17]

JUSTICE KENNEDY rejects my proposed effects test, as applied in these cases, because in his view *Balderas* District 24 lacks "any special claim to fairness," *ante*, at 446. But my analysis in no way depends on the proposition that *Balderas* District 24 was fair. The district *was* more compact than four of the districts that replaced it, and, as explained above, compactness serves important values in the districting process. This is why, in my view, a State that creates more compact districts should enjoy a safe harbor from partisan gerrymandering claims. However, the mere fact that a prior district was unfair should surely not provide a safe harbor for the creation of an even more unfair district. Conversely, a State may of course create less compact districts without violating the Constitution so long as its purpose is not to disadvantage a politically disfavored group. See *supra*, at 477–478, and n. 14. The reason I focus on *Balderas* District 24 is not because the district was fair, but because the prior district provides a clear benchmark in analyzing whether plaintiffs have been harmed.

In sum, applying the judicially manageable test set forth in this Part of my opinion reveals that the cracking of *Balderas* District 24 created several unconstitutional partisan gerrymanders. Even if I believed that Plan 1374C were not invalid in its entirety, I would reverse the judgment below with regard to Districts 6, 24, 26, and 32.

* * *

[17] Because new District 12, another district that covers portions of former District 24, is more compact than *Balderas* District 24, voters in new District 12 who previously resided in *Balderas* District 24 would not be able to bring a successful partisan gerrymandering claim under my proposed test, even though new District 12 is also a safe Republican district. See App. 106, 319–320.

For the foregoing reasons, although I concur with the majority's decision to invalidate District 23 under § 2 of the Voting Rights Act, I respectfully dissent from the Court's decision to affirm the judgment below with respect to plaintiffs' partisan gerrymandering claim. I would reverse with respect to the plan as a whole, and also, more specifically, with respect to Districts 6, 24, 26, and 32.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, concurring in part and dissenting in part.

I join Part II–D of the principal opinion, rejecting the one-person, one-vote challenge to Plan 1374C based simply on its mid-decade timing, and I also join Part II–A, in which the Court preserves the principle that partisan gerrymandering can be recognized as a violation of equal protection, see *Vieth* v. *Jubelirer*, 541 U. S. 267, 306 (2004) (KENNEDY, J., concurring in judgment); *id.*, at 317 (STEVENS, J., dissenting); *id.*, at 346 (SOUTER, J., dissenting); *id.*, at 355 (BREYER, J., dissenting). I see nothing to be gained by working through these cases on the standard I would have applied in *Vieth*, *supra*, at 346–355 (dissenting opinion), because here as in *Vieth* we have no majority for any single criterion of impermissible gerrymander (and none for a conclusion that Plan 1374C is unconstitutional across the board). I therefore treat the broad issue of gerrymander much as the subject of an improvident grant of certiorari, and add only two thoughts for the future: that I do not share JUSTICE KENNEDY's seemingly flat rejection of any test of gerrymander turning on the process followed in redistricting, see *ante*, at 416–420 (principal opinion), nor do I rule out the utility of a criterion of symmetry as a test, see, *e. g.*, King & Browning, Democratic Representation and Partisan Bias in Congressional Elections, 81 Am. Pol. Sci. Rev. 1251 (1987). Interest in exploring this notion is evident, see *ante*, at 419–420

(principal opinion); *ante*, at 465–468 (STEVENS, J., concurring in part and dissenting in part); *post*, at 491–492 (BREYER, J., concurring in part and dissenting in part). Perhaps further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.

I join Part III of the principal opinion, in which the Court holds that Plan 1374C's District 23 violates § 2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973, in diluting minority voting strength. But I respectfully dissent from Part IV, in which a plurality upholds the District Court's rejection of the claim that Plan 1374C violated § 2 in cracking the black population in the prior District 24 and submerging its fragments in new Districts 6, 12, 24, 26, and 32. On the contrary, I would vacate the judgment and remand for further consideration.

The District Court made a threshold determination resting reasonably on precedent of this Court and on a clear rule laid down by the Fifth Circuit, see *Valdespino* v. *Alamo Heights Independent School Dist.*, 168 F. 3d 848, 852–853 (1999), cert. denied, 528 U. S. 1114 (2000): the first condition for making out a § 2 violation, as set out in *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), requires "the minority group . . . to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district," *id.*, at 50, (here, the old District 24) before a dilution claim can be recognized under § 2.[1] Although both the plurality today and our own prior cases have sidestepped the question whether a statutory dilution claim can prevail without the possibility of a district percentage of minority voters above 50%, see *ante*, at 443; *Johnson* v. *De Grandy*, 512 U. S.

[1] In a subsequent case, however, we did not state the first *Gingles* condition in terms of an absolute majority. See *Johnson* v. *De Grandy*, 512 U. S. 997, 1008 (1994) ("[T]he first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice").

997, 1008–1009 (1994); *Voinovich* v. *Quilter*, 507 U. S. 146, 154 (1993); *Growe* v. *Emison*, 507 U. S. 25, 41, n. 5 (1993); *Gingles*, *supra*, at 46, n. 12, the day has come to answer it.

Chief among the reasons that the time has come is the holding in *Georgia* v. *Ashcroft*, 539 U. S. 461 (2003), that replacement of a majority-minority district by a coalition district with minority voters making up fewer than half can survive the prohibition of retrogression under § 5 of the Voting Rights Act, 42 U. S. C. § 1973c, enforced through the preclearance requirement, *Georgia*, 539 U. S., at 482–483. At least under § 5, a coalition district can take on the significance previously accorded to one with a majority-minority voting population. Thus, despite the independence of §§ 2 and 5, *id.*, at 477–479, there is reason to think that the integrity of the minority voting population in a coalition district should be protected much as a majority-minority bloc would be. While protection should begin through the preclearance process,[2] in jurisdictions where that is required, if that process fails a minority voter has no remedy under § 5 because the State and the Attorney General (or the District Court for the District of Columbia) are the only participants in preclearance, see 42 U. S. C. § 1973c. And, of course, vast areas of the country are not covered by § 5. Unless a minority voter is to be left with no recourse whatsoever, then, relief under § 2 must be possible, as by definition it would not be if a numerical majority of minority voters in a reconstituted or putative district is a necessary condition. I would therefore hold that a minority of 50% or less of the voting population might suffice at the *Gingles* gatekeeping stage. To have a clear-edged rule, I would hold it sufficient satisfaction of the first gatekeeping condition to show that minority voters in a reconstituted or putative district constitute a major-

[2] Like JUSTICE STEVENS, I agree with JUSTICE SCALIA that compliance with § 5 is a compelling state interest. See *ante*, at 475, n. 12 (STEVENS, J., concurring in part and dissenting in part); *post*, at 518–519 (SCALIA, J., concurring in judgment in part and dissenting in part).

ity of those voting in the primary of the dominant party, that is, the party tending to win in the general election.[3]

This rule makes sense in light of the explanation we gave in *Gingles* for the first condition for entertaining a claim for breach of the § 2 guarantee of racially equal opportunity "to elect representatives of . . . choice," 42 U. S. C. § 1973: "The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large . . . is this: Unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U. S., at 50, n. 17 (emphasis deleted); see also *id.*, at 90, n. 1 (O'Connor, J., concurring in judgment) ("[I]f a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice"). Hence, we emphasized that an analysis under § 2 of the political process should be "'functional.'" *Id.*, at 48, n. 15 (majority opinion); see also *Voinovich, supra*, at 158 ("[T]he *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim"). So it is not surprising that we have looked to political-primary data in considering the second and third *Gingles* conditions, to see whether there is racial bloc voting.

[3] I recognize that a minority group might satisfy the § 2 "ability to elect" requirement in other ways, and I do not mean to rule out other circumstances in which a coalition district might be required by § 2. A minority group slightly less than 50% of the electorate in nonpartisan elections for a local school board might, for example, show that it can elect its preferred candidates owing to consistent crossover support from members of other groups. Cf. *Valdespino* v. *Alamo Heights Independent School Dist.*, 168 F. 3d 848, 850–851 (CA5 1999), cert. denied, 528 U. S. 1114 (2000).

See, *e. g.*, *Abrams* v. *Johnson*, 521 U. S. 74, 91–92 (1997); *Gingles*, *supra*, at 52–54, 59–60.

The pertinence of minority voters' role in a primary is obvious: a dominant party's primary can determine the representative ultimately elected, as we recognized years ago in evaluating the constitutional importance of primary elections. See *United States* v. *Classic*, 313 U. S. 299, 318–319 (1941) ("Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2. . . . Here, . . . the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative"); *id.*, at 320 ("[A] primary election which involves a necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision"); *Smith* v. *Allwright*, 321 U. S. 649, 660 (1944) (noting "[t]he fusing by the *Classic* case of the primary and general elections into a single instrumentality for choice of officers"); *id.*, at 661–662 ("It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. . . . Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color").[4] These conclusions of our predeces-

[4] Cf. *California Democratic Party* v. *Jones*, 530 U. S. 567, 575 (2000) ("In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who

sors fit with recent scholarship showing that electoral success by minorities is adequately predictable by taking account of primaries as well as elections, among other things. See Grofman, Handley, & Lublin, Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence, 79 N. C. L. Rev. 1383 (2000–2001).[5]

I would accordingly not reject this §2 claim at step one of *Gingles*, nor on this record would I dismiss it by jumping to the ultimate §2 issue to be decided on a totality of the circumstances, see *De Grandy*, 512 U. S., at 1009–1022, and determine that the black plaintiffs cannot show that submerging them in the five new districts violated their right to equal opportunity to participate in the political process and elect candidates of their choice. The plurality, on the contrary, is willing to accept the conclusion that the minority voters lost nothing cognizable under §2 because they could not show the degree of control that guaranteed a candidate of their choice in the old District 24. See *ante*, at 443–446. The plurality accepts this conclusion by placing great weight on the fact that Martin Frost, the perennially successful congressional candidate in District 24, was white. See, *e. g.*, *ante*, at 444–445 (no clear error in District Court's findings that "no Black candidate has ever filed in a Democratic primary against Frost," *Session* v. *Perry*, 298 F. Supp. 2d 451, 484 (ED Tex. 2004) *(per curiam)*, and "[w]e have no measure of what Anglo turnout would be in a Democratic primary if Frost were opposed by a Black candidate," *ibid.*); *ante*, at 445 (no clear error in District Court's reliance on testimony of Congresswoman Eddie Bernice Johnson that "District 24

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becomes the party's ambassador to the general electorate in winning it over to the party's views").

[5] One must be careful about what such electoral success ostensibly shows; if the primary choices are constrained, say, by party rules, the minority voters' choice in the primary may not be truly their candidate of choice, see Note, *Gingles* In Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims, 80 N. Y. U. L. Rev. 312 (2005).

was drawn for an Anglo Democrat (Martin Frost, in particular) in 1991").

There are at least two responses. First, "[u]nder § 2, it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important." *Gingles*, *supra*, at 68 (emphasis deleted). Second, Frost was convincingly shown to have been the "chosen representative" of black voters in old District 24. In the absence of a black-white primary contest, the unchallenged evidence is that black voters dominated a primary that consistently nominated the same and ultimately successful candidate; it takes more than speculation to rebut the demonstration that Frost was the candidate of choice of the black voters.[6] There is no indication that party rules or any other device rigged the primary ballot so as to bar any aspirants the minority voters would have preferred, see n. 5, *supra*, and the uncontroverted and overwhelming evidence is that Frost was strongly supported by minority voters after more than two decades of sedulously considering minority interests, App. 107 (Frost's rating of 94% on his voting record from the National Association for the Advancement of Colored People exceeded the scores of all other members of the Texas congressional delegation, including black and Hispanic members of both major parties); *id.*, at 218–219 (testimony by State's political-science expert that Frost is the African-Americans' candidate of choice); *id.*, at 239 (testimony by Ron Kirk, an African-American former mayor of Dallas and U. S. Senate candidate, that Frost "has gained a very strong base of support among African-American . . . voters because of his strong voting records [in numerous areas]" and has "an incredible following and amount of respect among the African-American community"); *id.*, at 240–241 (Kirk's testi-

[6] Judge Ward properly noted that the fact that Frost has gone unchallenged may "reflect favorably on his record" of responding to the concerns of minorities in the district. See *Session* v. *Perry*, 298 F. Supp. 2d 451, 530 (ED Tex. 2004) (opinion concurring in part and dissenting in part).

mony that Frost has never had a contested primary because he is beloved by the African-American community, and that a black candidate, possibly including himself, could not better Frost in a primary because of his strong rapport with the black community); *id.*, at 242–243 (testimony by county precinct administrator that Frost has been the favored candidate of the African-American community and there have been no primary challenges to him because he "serves [African-American] interests").[7]

It is not that I would or could decide at this point whether the elimination of the prior district and composition of the new one violates § 2. The other *Gingles* gatekeeping rules have to be considered, with particular attention to the third, majority bloc voting, see 478 U. S., at 51, since a claim to a coalition district is involved.[8] And after that would come the ultimate analysis of the totality of circumstances. See *De Grandy*, *supra*, at 1009–1022.

I would go no further here than to hold that the enquiry should not be truncated by or conducted in light of the Fifth

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[7] In any event, although a history or prophecy of success in electing candidates of choice is a powerful touchstone of § 2 liability when minority populations are cracked or packed, electoral success is not the only manifestation of equal opportunity to participate in the political process, see *De Grandy*, 512 U. S., at 1014, n. 11. The diminution of that opportunity by taking minority voters who previously dominated the dominant party's primary and submerging them in a new district is not readily discounted by speculating on the effects of a black-white primary contest in the old district.

[8] The way this third condition is understood when a claim of a putative coalition district is made will have implications for the identification of candidate of choice under the first *Gingles* condition. Suffice it to say here that the criteria may not be the same when dealing with coalition districts as in cases of districts with majority-minority populations. All aspects of our established analysis for majority-minority districts in *Gingles* and its progeny may have to be rethought in analyzing ostensible coalition districts.

Circuit's 50% rule,[9] or by the candidate-of-choice analysis just rejected. I would return the §2 claim on old District 24 to the District Court, which has already labored so mightily on these cases. All the members of the three-judge court would be free to look again untethered by the 50% barrier, and Judge Ward, in particular, would have the opportunity to develop his reasons unconstrained by the Circuit's 50% rule, which he rightly took to limit his consideration of the claim, see *Session*, 298 F. Supp. 2d, at 528–531 (opinion concurring in part and dissenting in part).

JUSTICE BREYER, concurring in part and dissenting in part.

I join Parts II–A and III of the Court's opinion. I also join Parts I and II of JUSTICE STEVENS' opinion concurring in part and dissenting in part.

For one thing, the timing of the redistricting (between census periods), the radical departure from traditional boundary-drawing criteria, and the other evidence to which JUSTICE STEVENS refers in Parts I and II of his opinion make clear that a "desire to maximize partisan advantage" was the "sole purpose behind the decision to promulgate Plan 1374C." *Ante*, at 458. Compare, *e. g.*, App. 176–178; *ante*, at 452–455, 458–459 (opinion of STEVENS, J.), with *Vieth* v. *Jubelirer*, 541 U. S. 267, 366–367 (2004) (BREYER, J., dissenting).

For another thing, the evidence to which JUSTICE STEVENS refers in Part III of his opinion demonstrates that the

[9] Notably, under the Texas Legislature's Plan 1374C, there are three undisputed districts where African-Americans tend to elect their candidates of choice. African-Americans compose at most a citizen voting-age majority (50.6%) in one of the three, District 30, see *Session*, *supra*, at 515; even there, the State's expert pegged the percentage at 48.6%, App. 185–186. In any event, the others, Districts 9 and 18, are coalition districts, with African-American citizen voting-age populations of 46.9% and 48.6% respectively. *Id.*, at 184–185.

plan's effort "to maximize partisan advantage," *ante*, at 458, encompasses an effort not only to exaggerate the favored party's electoral majority but also to produce a majority of congressional representatives even if the favored party receives only a *minority* of popular votes. Compare *ante*, at 465–468 (opinion of STEVENS, J.), App. 55 (plaintiffs' expert), and *id.*, at 216 (State's expert), with *Vieth*, *supra*, at 360 (BREYER, J., dissenting).

Finally, because the plan entrenches the Republican Party, the State cannot successfully defend it as an effort simply to *neutralize* the Democratic Party's previous political gerrymander. Nor has the State tried to justify the plan on nonpartisan grounds, either as an effort to achieve legislative stability by avoiding legislative exaggeration of small shifts in party preferences, see *Vieth*, 541 U. S., at 359 (same), or in any other way.

In sum, "the risk of entrenchment is demonstrated," "partisan considerations [have] render[ed] the traditional district-drawing compromises irrelevant," and "no justification other than party advantage can be found." *Id.*, at 367 (same). The record reveals a plan that overwhelmingly relies upon the unjustified use of purely partisan line-drawing considerations and which will likely have seriously harmful electoral consequences. *Ibid.* For these reasons, I believe the plan in its entirety violates the Equal Protection Clause.

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins, concurring in part, concurring in the judgment in part, and dissenting in part.

I join Parts I and IV of the plurality opinion. With regard to Part II, I agree with the determination that appellants have not provided "a reliable standard for identifying unconstitutional political gerrymanders." *Ante*, at 423. The question whether any such standard exists—that is, whether a challenge to a political gerrymander presents a justiciable case or controversy—has not been argued in these cases. I therefore take no position on that question, which

has divided the Court, see *Vieth* v. *Jubelirer*, 541 U. S. 267 (2004), and I join the Court's disposition in Part II without specifying whether appellants have failed to state a claim on which relief can be granted, or have failed to present a justiciable controversy.

I must, however, dissent from Part III of the Court's opinion. According to the District Court's factual findings, the State's drawing of district lines in south and west Texas caused the area to move from five out of seven effective Latino opportunity congressional districts, with an additional district "moving" in that direction, to *six* out of seven effective Latino opportunity districts. See *Session* v. *Perry*, 298 F. Supp. 2d 451, 489, 503–504 (ED Tex. 2004) *(per curiam)*. The end result is that while Latinos make up 58% of the citizen voting-age population in the area, they control 85% (six of seven) of the districts under the State's plan.

In the face of these findings, the majority nonetheless concludes that the State's plan somehow dilutes the voting strength of Latinos in violation of §2 of the Voting Rights Act of 1965. The majority reaches its surprising result because it finds that Latino voters in one of the State's Latino opportunity districts—District 25—are insufficiently compact, in that they consist of two different groups, one from around the Rio Grande and another from around Austin. According to the majority, this may make it more difficult for certain Latino-preferred candidates to be elected from that district—*even though Latino voters make up 55% of the citizen voting-age population in the district and vote as a bloc.* *Id.*, at 492, n. 126, 503. The majority prefers old District 23, despite the District Court determination that new District 25 is "a more effective Latino opportunity district than Congressional District 23 had been." *Id.*, at 503; see *id.*, at 489, 498–499. The District Court based that determination on a careful examination of regression analysis showing that "the Hispanic-preferred candidate [would win] *every* primary and general election examined in District 25," *id.*, at 503 (emphasis added), compared to the only partial success

such candidates enjoyed in former District 23, *id.*, at 488, 489, 496.

The majority dismisses the District Court's careful factfinding on the ground that the experienced judges did not properly consider whether District 25 was "compact" for purposes of § 2. *Ante*, at 430–431. But the District Court opinion itself clearly demonstrates that the court carefully considered the compactness of the minority group in District 25, just as the majority says it should have. The District Court recognized the very features of District 25 highlighted by the majority and unambiguously concluded, under the totality of the circumstances, that the district was an effective Latino opportunity district, and that no violation of § 2 in the area had been shown.

Unable to escape the District Court's factfinding, the majority is left in the awkward position of maintaining that its *theory* about compactness is more important under § 2 than the actual prospects of electoral success for Latino-preferred candidates under a State's apportionment plan. And that theory is a novel one to boot. Never before has this or any other court struck down a State's redistricting plan under § 2, on the ground that the plan achieves the maximum number of possible majority-minority districts, but loses on style points, in that the minority voters in one of those districts are not as "compact" as the minority voters would be in another district were the lines drawn differently. Such a basis for liability pushes voting rights litigation into a whole new area—an area far removed from the concern of the Voting Rights Act to ensure minority voters an equal opportunity "to elect representatives of their choice." 42 U. S. C. § 1973(b).

I

Under § 2, a plaintiff alleging "a denial or abridgement of the right of [a] citizen of the United States to vote on account of race or color," § 1973(a), must show, "based on the totality of circumstances,"

> "that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." § 1973(b).

In *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), we found that a plaintiff challenging the State's use of multimember districts could meet this standard by showing that replacement of the multimember district with several single-member districts would likely provide minority voters in at least some of those single-member districts "the ability . . . to elect representatives of their choice." *Id.*, at 48. The basis for this requirement was simple: If no districts were possible in which minority voters had prospects of electoral success, then the use of multimember districts could hardly be said to thwart minority voting power under § 2. See *ibid.* ("Minority voters who contend that the multimember form of districting violates § 2 must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates").

The next generation of voting rights litigation confirmed that "manipulation of [single-member] district lines" could also dilute minority voting power if it packed minority voters in a few districts when they might control more, or dispersed them among districts when they might control some. *Voinovich* v. *Quilter*, 507 U. S. 146, 153–154 (1993). Again the basis for this application of *Gingles* was clear: A configuration of district lines could only dilute minority voting strength if under another configuration minority voters had better electoral prospects. Thus in cases involving single-member districts, the question was whether an *additional* majority-minority district should be created, see *Abrams* v. *Johnson*, 521 U. S. 74, 91–92 (1997); *Growe* v. *Emison*, 507 U. S. 25, 38 (1993), or whether *additional* influence districts

should be created to supplement existing majority-minority districts, see *Voinovich, supra,* at 154.

We have thus emphasized, since *Gingles* itself, that a §2 plaintiff must at least show an apportionment that is likely to perform *better* for minority voters, compared to the existing one. See 478 U. S., at 99 (O'Connor, J., concurring in judgment) ("[T]he relative lack of minority electoral success under a challenged plan, when compared with the success that would be predicted under the measure of undiluted minority voting strength the court is employing, can constitute powerful evidence of vote dilution"). And unsurprisingly, in the context of single-member districting schemes, we have invariably understood this to require the possibility of *additional* single-member districts that minority voters might control.

Johnson v. *De Grandy*, 512 U. S. 997 (1994), reaffirmed this understanding. The plaintiffs in *De Grandy* claimed that, by reducing the size of the Hispanic majority in some districts, *additional* Hispanic-majority districts could be created. *Id.*, at 1008. The State defended a plan that did not do so on the ground that the proposed additional districts, while containing nominal Hispanic majorities, would "lack enough Hispanic voters to elect candidates of their choice without cross-over votes from other ethnic groups," and thus could not bolster Hispanic voting strength under §2. *Ibid.*

In keeping with the requirement that a §2 plaintiff must show that an alternative apportionment would present *better* prospects for minority-preferred candidates, the Court set out the condition that a challenge to an existing set of single-member districts must show the possibility of "creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Ibid.* *De Grandy* confirmed that simply proposing a set of districts that divides up a minority population in a different manner than the State has chosen,

without a gain in minority opportunity districts, does not show vote dilution, but "only that lines could have been drawn elsewhere." *Id.*, at 1015.

Here the District Court found that six Latino-majority districts were all that south and west Texas could support. Plan 1374C provides six such districts, just as its predecessor did. This fact, combined with our precedent making clear that § 2 plaintiffs must show an alternative with *better* prospects for minority success, should have resulted in affirmance of the District Court decision on vote dilution in south and west Texas. See *Gingles*, *supra*, at 79 ("[T]he clearly-erroneous test of [Federal Rule of Civil Procedure] 52(a) is the appropriate standard for appellate review of a finding of vote dilution. . . . [W]hether the political process is equally open to minority voters . . . is peculiarly dependent upon the facts" (internal quotation marks omitted)); *Rogers* v. *Lodge*, 458 U. S. 613, 622, 627 (1982).

The majority avoids this result by finding fault with the District Court's analysis of one of the Latino-majority districts in the State's plan. That district—District 25—is like other districts in the State's plan, like districts in the predecessor plan, and like districts in the *plaintiffs'* proposed seven-district plan, in that it joins population concentrations around the border area with others closer to the center of the State. The District Court explained that such "'bacon-strip'" districts are inevitable, given the geography and demography of that area of the State. *Session*, 298 F. Supp. 2d, at 486–487, 490, 491, n. 125, 502.

The majority, however, criticizes the District Court because its consideration of the compactness of District 25 under § 2 was deficient. According to the majority,

> "the court analyzed the issue only for equal protection purposes. In the equal protection context, compactness focuses on the contours of district lines to determine whether race was the predominant factor in drawing

those lines. Under §2, by contrast, the injury is vote dilution, so the compactness inquiry embraces different considerations." *Ante*, at 433 (citation omitted).

This is simply an inaccurate description of the District Court's opinion. The District Court expressly considered compactness in the §2 context. That is clear enough from the fact that the majority *quotes* the District Court's opinion in elaborating on the standard of compactness it believes the District Court *should* have applied. See *ante*, at 424 (quoting *Session*, *supra*, at 502); *ante*, at 434 (quoting *Session*, *supra*, at 502). The very passage quoted by the majority about the different "'needs and interests'" of the communities in District 25, *ante*, at 424, appeared in the District Court opinion precisely because the District Court recognized that those concerns "bear on the extent to which the new districts"—including District 25—"are functionally effective Latino opportunity districts, important to understanding whether *dilution* results from Plan 1374C," *Session*, 298 F. Supp. 2d, at 502 (emphasis added); see also *ibid.* (noting different "needs and interests of Latino communities" in the "'bacon-strip'" districts and concluding that "[t]he issue is whether these features mean that the newly-configured districts *dilute the voting strength* of Latinos" (emphasis added)).

Indeed, the District Court addressed compactness in two different sections of its opinion: in Part VI–C with respect to vote dilution under §2, and in Part VI–D with respect to whether race predominated in drawing district lines, for purposes of equal protection analysis. The District Court even explained, in considering in Part VI–C the differences between the Latino communities in the bacon-strip districts (including District 25) for purposes of vote dilution under §2, how the same concerns bear on the plaintiffs' equal protection claim, discussed in Part VI–D. *Id.*, at 502, n. 168. The majority faults the District Court for discussing "the relative smoothness of the district lines," because that is only perti-

nent in the equal protection context, *ante*, at 432, but it was only in the equal protection context that the District Court mentioned the relative smoothness of district lines. See 298 F. Supp. 2d, at 506–508. In discussing compactness in Part VI–C, with respect to vote dilution under §2, the District Court considered precisely what the majority says it should have: the diverse needs and interests of the different Latino communities in the district. Unlike the majority, however, the District Court properly recognized that the question under §2 was "whether these features mean that the newly-configured districts dilute the voting strength of Latinos." *Id.*, at 502.

The District Court's answer to that question was unambiguous:

> "Witnesses testified that Congressional Districts 15 and 25 would span *colonias* in Hidalgo County and suburban areas in Central Texas, but the witnesses testified, and the regression data show, that both districts are effective Latino opportunity districts, with the Hispanic-preferred candidate winning every primary and general election examined in District 25." *Id.*, at 503.

The District Court emphasized this point again later on:

> "The newly-configured Districts 15, 25, 27, and 28 cover more territory and travel farther north than did the corresponding districts in Plan 1151C. The districts combine more voters from the central part of the State with voters from the border cities than was the case in Plan 1151C. The population data, regression analyses, and the testimony of both expert witnesses and witnesses knowledgeable about how politics actually works in the area lead to the finding that in Congressional Districts 25 and 28, Latino voters will likely control every primary and general election outcome." *Id.*, at 503–504.

I find it inexplicable how the majority can read these passages and state that the District Court reached its finding

on the effectiveness of District 25 "without accounting for the detrimental consequences of its compactness problems." *Ante*, at 442. The majority does "not question" the District Court's parsing of the statistical evidence to reach the finding that District 25 was an effective Latino opportunity district. *Ante*, at 434. But the majority nonetheless rejects that finding, based on its own theory that "[t]he practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals," *ibid.*, and because the finding rests on the "prohibited assumption" that voters of the same race will "think alike, share the same political interests, and will prefer the same candidates at the polls," *ante*, at 433 (internal quotation marks omitted). It is important to be perfectly clear about the following, out of fairness to the District Court if for no other reason: No one has made any "assumptions" about how voters in District 25 will vote based on their ethnic background. Not the District Court; not this dissent. There was a trial. At trials, assumptions and assertions give way to facts. In voting rights cases, that is typically done through regression analyses of past voting records. Here, those analyses showed that the Latino candidate of choice prevailed in every primary and general election examined for District 25. See *Session*, 298 F. Supp. 2d, at 499–500. Indeed, a plaintiffs' expert conceded that Latino voters in District 25 "have an effective opportunity to control outcomes in both primary and general elections." *Id.*, at 500. The District Court, far from "assum[ing]" that Latino voters in District 25 would "prefer the same candidate at the polls," concluded that they were likely to do so based on statistical evidence of historic voting patterns.

Contrary to the erroneous statements in the majority opinion, the District Court judges did *not* simply "aggregat[e]" minority voters to measure effectiveness. *Ante*, at 432. They did *not* simply rely on the "mathematical possibility" of minority voters voting for the same preferred

candidate, *ante*, at 435, and it is a disservice to them to state otherwise. It is the majority that is indulging in unwarranted "assumption[s]" about voting, contrary to the facts found at trial based on carefully considered evidence.

What is blushingly ironic is that the district preferred by the majority—former District 23—suffers from the same "flaw" the majority ascribes to District 25, except to a greater degree. While the majority decries District 25 because the Latino communities there are separated by "enormous geographical distance," *ibid.*, and are "hundreds of miles apart," *ante*, at 441, Latino communities joined to form the voting majority in old District 23 are nearly twice as far apart. Old District 23 runs "from El Paso, over 500 miles, into San Antonio and down into Laredo. It covers a much longer distance than . . . the 300 miles from Travis to McAllen [in District 25]." App. 292 (testimony of T. Giberson); see *id.*, at 314 (expert report of T. Giberson) ("[D]istrict 23 in any recent Congressional plan extends from the outskirts of El Paso down to Laredo, dipping into San Antonio and spanning 540 miles"). So much for the significance of "enormous geographical distance." Or perhaps the majority is willing to "assume" that Latinos around San Antonio have common interests with those on the Rio Grande rather than those around Austin, even though San Antonio and Austin are a good bit closer to each other (less than 80 miles apart) than either is to the Rio Grande.*

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*The majority's fig leaf after stressing the distances involved in District 25—while ignoring the greater ones in former District 23—is to note that "it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 noncompact for §2 purposes." *Ante*, at 435. Of course no single factor is determinative because the ultimate question is whether the district is an effective majority-minority opportunity district. There was a trial on that; the District Court found that District 25 was, while former District 23 "did not perform as an effective opportunity district." *Session* v. *Perry*, 298 F. Supp. 2d 451, 496 (ED Tex. 2004) *(per curiam)*. The majority notes that there was no challenge to or finding on the compactness of

The District Court considered expert evidence on projected election returns and concluded that District 25 would likely perform impeccably for Latino voters, better indeed than former District 23. See *Session*, 298 F. Supp. 2d, at 503–504, 488, 489, 496. The District Court also concluded that the other districts in Plan 1374C would give Latino voters a favorable opportunity to elect their preferred candidates. See *id.*, at 499 (observing the parties' agreement that Districts 16 and 20 in Plan 1374C "do clearly provide effective Latino citizen voting age population majorities"); *id.*, at 504 ("Latino voters will likely control every primary and general election outcome" in District 28, and "every primary outcome and almost every general election outcome" in Districts 15 and 27, under Plan 1374C). In light of these findings, the District Court concluded that "compared to Plan 1151C . . . Plaintiffs have not shown an impermissible reduction in effective opportunities for Latino electoral control or in opportunities for Latino participation in the political process." *Ibid.*

Viewed against this backdrop, the majority's holding that Plan 1374C violates §2 amounts to this: A State has denied minority voters equal opportunity to "participate in the political process and to elect representatives of their choice," 42 U. S. C. §1973(b), when the districts in the plan a State has created have *better* prospects for the success of

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old District 23, *ante*, at 435—certainly not compared to District 25—but presumably that was because, as the majority does not dispute, "[u]ntil today, no court has ever suggested that lack of compactness under §2 might invalidate a district that a State has chosen to create in the first instance," *infra*, at 505. The majority asserts that Latino voters in old District 23 had found an "efficacious political identity," while doing so would be a challenge for such voters in District 25, *ante*, at 435, but the latter group has a distinct advantage over the former in this regard: They actually *vote* to a significantly greater extent. See App. 187 (expert report of R. Gaddie) (for Governor and Senate races in 2002, estimated Latino turnout for District 25 was 46% to 51%, compared to 41.3% and 44% for District 23).

minority-preferred candidates than an alternative plan, simply because one of the State's districts combines different minority communities, which, in any event, are likely to vote as a controlling bloc. It baffles me how this could be vote dilution, let alone how the District Court's contrary conclusion could be clearly erroneous.

II

The majority arrives at the wrong resolution because it begins its analysis in the wrong place. The majority declares that a *Gingles* violation is made out "[c]onsidering" former District 23 "in isolation," and chides the State for suggesting that it can remedy this violation "by creating new District 25 as an offsetting opportunity district." *Ante*, at 429. According to the majority, "§ 2 does not forbid the creation of a noncompact majority-minority district," but "[t]he noncompact district cannot . . . remedy a violation elsewhere in the State." *Ante*, at 430.

The issue, however, is not whether a § 2 violation in District 23, viewed "in isolation," can be remedied by the creation of a Latino opportunity district in District 25. When the question is where a fixed number of majority-minority districts should be located, the analysis should never begin by asking whether a *Gingles* violation can be made out in any one district "in isolation." In these circumstances, it is always possible to look at one area of minority population "in isolation" and see a "violation" of § 2 under *Gingles*. For example, if a State drew three districts in a group, with 60% minority voting-age population in the first two, and 40% in the third, the 40% can readily claim that their opportunities are being thwarted because *they* were not grouped with an additional 20% of minority voters from one of the other districts. But the remaining minority voters in the other districts would have precisely the same claim if minority voters were shifted from their districts to join the 40%. See *De Grandy*, 512 U. S., at 1015–1016 ("[S]ome dividing by district

lines and combining within them is virtually inevitable and befalls any population group of substantial size"). That is why the Court has explained that no individual minority voter has a right to be included in a majority-minority district. See *Shaw* v. *Hunt*, 517 U. S. 899, 917, and n. 9 (1996) *(Shaw II); id.*, at 947 (STEVENS, J., dissenting). Any other approach would leave the State caught between incompatible claims by different groups of minority voters. See *Session*, *supra*, at 499 ("[T]here is neither sufficiently dense and compact population in general nor Hispanic population in particular to support" retaining former District 23 *and* adding District 25).

The correct inquiry under §2 is not whether a *Gingles* violation can be made out with respect to one district "in isolation," but instead whether line-drawing in the challenged area as a whole dilutes minority voting strength. A proper focus on the district lines in the area as a whole also demonstrates why the majority's reliance on *Bush* v. *Vera*, 517 U. S. 952 (1996), and *Shaw II* is misplaced.

In those cases, we rejected on the basis of lack of compactness districts that a State defended against equal protection strict scrutiny on the grounds that they were necessary to avoid a §2 violation. See *Vera*, *supra*, at 977–981 (plurality opinion); *Shaw II*, *supra*, at 911, 916–918. But those cases never suggested that a plaintiff proceeding under §2 could rely on lack of compactness to prove liability. And the districts in those cases were nothing like District 25 here. To begin with, they incorporated multiple, small, farflung pockets of minority population, and did so by ignoring the boundaries of political subdivisions. *Vera*, *supra*, at 987–989 (Appendices A–C to plurality opinion) (depicting districts); *Shaw II*, *supra*, at 902–903 (describing districts). Here the District Court found that the long and narrow but more normal shape of District 25 was shared by other districts both in the state plan and the predecessor plan—not to mention the plaintiffs' own proposed plan—and resulted from the demog-

raphy and geography of south and west Texas. See *Session*, 298 F. Supp. 2d, at 487–488, 491, and n. 125. And *none* of the minority voters in the *Vera* and *Shaw II* districts could have formed part of a *Gingles*-compliant district, see *Vera*, *supra*, at 979 (plurality opinion) (remarking of one of the districts at issue that it "reaches out to grab small and apparently isolated minority communities which, based on the evidence presented, could not possibly form part of a compact majority-minority district"); *Shaw II*, 517 U. S., at 916–917 (describing the challenged district as "in no way coincident with the compact *Gingles* district"); while here no one disputes that at least the Latino voters in the border area of District 25—the larger concentration—*must* be part of a Latino-majority district if six are to be placed in south and west Texas.

This is not, therefore, a case of the State drawing a majority-minority district "anywhere," once a §2 violation has been established elsewhere in the State. *Id.*, at 917. The question is instead whether the State has some latitude in deciding where to place the maximum possible number of majority-minority districts, when one of those districts contains a substantial proportion of minority voters who *must* be in a majority-minority district if the maximum number is to be created at all.

Until today, no court has ever suggested that lack of compactness under §2 might invalidate a district that a State has chosen to create in the first instance. The "geographica[l] compact[ness]" of a minority population has previously been only an element of the *plaintiff's* case. See *Gingles*, 478 U. S., at 49–50. That is to say, the §2 plaintiff bears the burden of demonstrating that "the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.*, at 50. Thus compactness, when it has been invoked by lower courts to defeat §2 claims, has been applied to a remedial district a *plaintiff* proposes. See, *e. g.*, *Sensley* v. *Albritton*, 385 F. 3d

591, 596–597 (CA5 2004); *Mallory* v. *Ohio*, 173 F. 3d 377, 382–383 (CA6 1999); *Stabler* v. *County of Thurston*, 129 F. 3d 1015, 1025 (CA8 1997). Indeed, the most we have had to say about the compactness aspect of the *Gingles* inquiry is to profess doubt whether it was met when the district a §2 plaintiff proposed was "oddly shaped." *Growe* v. *Emison*, 507 U. S., at 38, 41. And even then, we rejected §2 liability not because of the odd shape, but because no evidence of majority bloc voting had been submitted. *Id.*, at 41–42.

Far from imposing a freestanding compactness obligation on the States, we have repeatedly emphasized that "States retain broad discretion in drawing districts to comply with the mandate of §2," *Shaw II*, *supra*, at 917, n. 9, and that §2 itself imposes "no *per se* prohibitions against particular types of districts," *Voinovich* v. *Quilter*, 507 U. S., at 155. We have said that the States retain "flexibility" in complying with voting rights obligations that "federal courts enforcing §2 lack." *Vera*, *supra*, at 978. The majority's intrusion into line-drawing, under the authority of §2, when the lines already achieve the maximum possible number of majority-minority opportunity districts, suggests that all this is just so much hollow rhetoric.

The majority finds fault in a "one-way rule whereby plaintiffs must show compactness but States need not," *ante*, at 431, without bothering to explain how its contrary rule of equivalence between plaintiffs litigating and the elected representatives of the people legislating comports with our repeated assurances concerning the discretion and flexibility left to the States. Section 2 is, after all, part of the Voting Rights Act, not the Compactness Rights Act. The word "compactness" appears nowhere in §2, nor even in the agreed-upon legislative history. See *Gingles*, *supra*, at 36–37. To bestow on compactness such precedence in the §2 inquiry is the antithesis of the totality test that the statute contemplates. *De Grandy*, 512 U. S., at 1011 ("[T]he ultimate conclusions about equality or inequality of opportunity

were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts"). Suggesting that determinative weight should have been given this one factor contravenes our understanding of how §2 analysis proceeds, see *Gingles*, 478 U. S., at 45 (quoting statement from the legislative history of §2 that "'there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other'"), particularly when the proper standard of review for the District Court's ultimate judgment under §2 is clear error, see *id.*, at 78–79.

A §2 plaintiff has no legally protected interest in compactness, apart from how deviations from it dilute the equal opportunity of minority voters "to elect representatives of their choice." §1973(b). And the District Court found that any effect on this opportunity caused by the different "needs and interests" of the Latino voters within District 25 was at least offset by the fact that, despite these differences, they were likely to prefer the same candidates at the polls. This finding was based on the evidence, not assumptions.

Whatever the competing merits of old District 23 and new District 25 at the margins, judging between those two majority-minority districts is surely the responsibility of the legislature, not the courts. See *Georgia* v. *Ashcroft*, 539 U. S. 461, 480 (2003). The majority's squeamishness about the supposed challenge facing a Latino-preferred candidate in District 25—having to appeal to Latino voters near the Rio Grande and those near Austin—is not unlike challenges candidates face around the country all the time, as part of a healthy political process. It is in particular not unlike the challenge faced by a Latino-preferred candidate in the district favored by the majority, former District 23, who must appeal to Latino voters both in San Antonio and in El Paso, 540 miles away. "[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying

a statute meant to hasten the waning of racism in American politics." *De Grandy*, 512 U. S., at 1020. As the Court has explained, "the ultimate right of §2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *Id.*, at 1014, n. 11. Holding that such *opportunity* is denied because a State draws a district with 55% minority citizen voting-age population, rather than keeping one with a similar percentage (but lower turnout) that did not in any event consistently elect minority-preferred candidates, gives an unfamiliar meaning to the word "opportunity."

III

Even if a plaintiff satisfies the *Gingles* factors, a finding of vote dilution under §2 does not automatically follow. In *De Grandy*, we identified another important aspect of the totality inquiry under §2: whether "minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population." 512 U. S., at 1000. A finding of proportionality under this standard can defeat §2 liability even if a clear *Gingles* violation has been made out. In *De Grandy* itself, we found that "substantial proportionality" defeated a claim that the district lines at issue "diluted the votes cast by Hispanic voters," 512 U. S., at 1014–1015, even assuming that the plaintiffs had shown "the possibility of creating *more* than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice," *id.*, at 1008–1009 (emphasis added).

The District Court determined that south and west Texas was the appropriate geographic frame of reference for analyzing proportionality: "If South and West Texas is the only area in which *Gingles* is applied and can be met, as Plaintiffs argue, it is also the relevant area for measuring proportionality." *Session*, 298 F. Supp. 2d, at 494. As the court ex-

plained, "[l]ower courts that have analyzed 'proportionality' in the *De Grandy* sense have been consistent in using the same frame of reference for that factor and for the factors set forth in *Gingles*." *Id.*, at 493–494, and n. 131 (citing cases).

In south and west Texas, Latinos constitute 58% of the relevant population and control 85% (six out of seven) of the congressional seats in that region. That includes District 25, because the District Court found, without clear error, that Latino voters in that district "will likely control every primary and general election outcome." *Id.*, at 504. But even not counting that district as a Latino opportunity district, because of the majority's misplaced compactness concerns, Latinos in south and west Texas still control congressional seats in a markedly greater proportion—71% (five out of seven)—than their share of the population there. In other words, in the only area in which the *Gingles* factors can be satisfied, Latino voters enjoy effective political power 46% above their numerical strength, or, even disregarding District 25 as an opportunity district, 24% above their numerical strength. See *De Grandy*, 512 U. S., at 1017, n. 13. Surely these figures do not suggest a denial of equal *opportunity* to *participate* in the political process.

The majority's only answer is to shift the focus to statewide proportionality. In *De Grandy* itself, the Court rejected an argument that proportionality should be analyzed on a statewide basis as "flaw[ed]," because "the argument would recast these cases as they come to us, in order to bar consideration of proportionality except on statewide scope, whereas up until now the dilution claims have been litigated on a smaller geographical scale." *Id.*, at 1021–1022. The same is true here: The plaintiffs' § 2 claims concern "the impact of the legislative plan on Latino voting strength *in South and West Texas*," *Session*, *supra*, at 486 (emphasis added), and that is the only area of the State in which they can satisfy the *Gingles* factors. That is accordingly the proper frame of reference in analyzing proportionality.

In any event, at a statewide level, 6 Latino opportunity districts out of 32, or 19% of the seats, would certainly seem to be "roughly proportional" to the Latino 22% share of the population. See *De Grandy*, *supra*, at 1000. The District Court accordingly determined that proportionality suggested the lack of vote dilution, even considered on a statewide basis. *Session*, *supra*, at 494. The majority avoids that suggestion by disregarding the District Court's factual finding that District 25 is an effective Latino opportunity district. That is not only improper, for the reasons given, but the majority's rejection of District 25 as a Latino opportunity district is also flatly inconsistent with its statewide approach to analyzing proportionality. Under the majority's view, the Latino voters in the northern end of District 25 cannot "count" along with the Latino voters at the southern end to form an effective majority, because they belong to different communities. But Latino voters from everywhere around the State of Texas—even those from areas where the *Gingles* factors are not satisfied—can "count" for purposes of calculating the proportion against which effective Latino electoral power should be measured. Heads the plaintiffs win; tails the State loses.

* * *

The State has drawn a redistricting plan that provides six of seven congressional districts with an effective majority of Latino voting-age citizens in south and west Texas, and it is not possible to provide more. The majority nonetheless faults the state plan because of the *particular mix* of Latino voters forming the majority in one of the six districts—a combination of voters from around the Rio Grande and from around Austin, as opposed to what the majority uncritically views as the more monolithic majority assembled (from more farflung communities) in old District 23. This despite the express factual findings, from judges far more familiar with Texas than we are, that the State's new district would be a

more effective Latino-majority district than old District 23 ever was, and despite the fact that *any* plan would necessarily leave *some* Latino voters outside a Latino-majority district.

Whatever the majority believes it is fighting with its holding, it is not vote dilution on the basis of race or ethnicity. I do not believe it is our role to make judgments about which *mixes* of minority voters should count for purposes of forming a majority in an electoral district, in the face of factual findings that the district is an effective majority-minority district. It is a sordid business, this divvying us up by race. When a State's plan already provides the maximum possible number of majority-minority effective opportunity districts, and the minority enjoys effective political power in the area well in *excess* of its proportion of the population, I would conclude that the courts have no further role to play in rejiggering the district lines under § 2.

I respectfully dissent from Part III of the Court's opinion.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom THE CHIEF JUSTICE and JUSTICE ALITO join as to Part III, concurring in the judgment in part and dissenting in part.

I

As I have previously expressed, claims of unconstitutional partisan gerrymandering do not present a justiciable case or controversy. See *Vieth* v. *Jubelirer*, 541 U. S. 267, 271–306 (2004) (plurality opinion). JUSTICE KENNEDY's discussion of appellants' political-gerrymandering claims ably demonstrates that, yet again, no party or judge has put forth a judicially discernible standard by which to evaluate them. See *ante*, at 413–423. Unfortunately, the opinion then concludes that appellants have failed to state a claim as to political gerrymandering, without ever articulating what the elements of such a claim consist of. That is not an available disposition of this appeal. We must either conclude

that the claim is nonjusticiable and dismiss it, or else set forth a standard and measure appellants' claim against it. *Vieth, supra,* at 301. Instead, we again dispose of this claim in a way that provides no guidance to lower court judges and perpetuates a cause of action with no discernible content. We should simply dismiss appellants' claims as nonjusticiable.

II

I would dismiss appellants' vote-dilution claims premised on § 2 of the Voting Rights Act of 1965 for failure to state a claim, for the reasons set forth in JUSTICE THOMAS's opinion, which I joined, in *Holder* v. *Hall,* 512 U. S. 874, 891–946 (1994) (opinion concurring in judgment). As THE CHIEF JUSTICE makes clear, see *ante,* p. 492 (opinion concurring in part, concurring in judgment in part, and dissenting in part), the Court's § 2 jurisprudence continues to drift ever further from the Act's purpose of ensuring minority voters equal electoral opportunities.

III

Because I find no merit in either of the claims addressed by the Court, I must consider appellants' race-based equal protection claims. The GI Forum appellants focus on the removal of 100,000 residents, most of whom are Latino, from District 23. They assert that this action constituted intentional vote dilution in violation of the Equal Protection Clause. The Jackson appellants contend that the intentional creation of District 25 as a majority-minority district was an impermissible racial gerrymander. The District Court rejected the equal protection challenges to both districts.

A

The GI Forum appellants contend that the Texas Legislature removed a large number of Latino voters living in Webb County from District 23 with the purpose of diminishing Latino electoral power in that district. Congressional redistricting is primarily a responsibility of state legislatures, and legislative motives are often difficult to discern. We pre-

sume, moreover, that legislatures fulfill this responsibility in a constitutional manner. Although a State will almost always be aware of racial demographics when it redistricts, it does not follow from this awareness that the State redistricted on the basis of race. See *Miller* v. *Johnson*, 515 U. S. 900, 915–916 (1995). Thus, courts must "exercise extraordinary caution" in concluding that a State has intentionally used race when redistricting. *Id.*, at 916. Nevertheless, when considerations of race predominate, we do not hesitate to apply the strict scrutiny that the Equal Protection Clause requires. See, *e. g.*, *Shaw* v. *Hunt*, 517 U. S. 899, 908 (1996) *(Shaw II)*; *Miller*, *supra*, at 920.

At the time the legislature redrew Texas's congressional districts, District 23 was represented by Congressman Henry Bonilla, whose margin of victory and support among Latinos had been steadily eroding. See *Session* v. *Perry*, 298 F. Supp. 2d 451, 488–489 (ED Tex. 2004) *(per curiam)*. In the 2002 election, he won with less than 52 percent of the vote, *ante*, at 423–424 (opinion of the Court), and received only 8 percent of the Latino vote, *Session*, 298 F. Supp. 2d, at 488. The District Court found that the goal of the map drawers was to adjust the lines of that district to protect the imperiled incumbent: "The record presents undisputed evidence that the Legislature desired to increase the number of Republican votes cast in Congressional District 23 to shore up Bonilla's base and assist in his reelection." *Ibid.* To achieve this goal, the legislature extended the district north to include counties in the central part of the State with residents who voted Republican, adding 100,000 people to the district. Then, to comply with the one-person, one-vote requirement, the legislature took one-half of heavily Democratic Webb County, in the southern part of the district, and included it in the neighboring district. *Id.*, at 488–489.

Appellants acknowledge that the State redrew District 23 at least in part to protect Bonilla. They argue, however, that they assert an intentional vote-dilution claim that is analytically distinct from the racial-gerrymandering claim of

the sort at issue in *Shaw* v. *Reno*, 509 U. S. 630, 642–649 (1993) *(Shaw I)*. A vote-dilution claim focuses on the majority's intent to harm a minority's voting power; a *Shaw I* claim focuses instead on the State's purposeful classification of individuals by their race, regardless of whether they are helped or hurt. *Id.*, at 651–652 (distinguishing the vote-dilution claim in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144 (1977)). In contrast to a *Shaw I* claim, appellants contend, in a vote-dilution claim the plaintiff need not show that the racially discriminatory motivation *predominated*, but only that the invidious purpose was *a* motivating factor. Appellants contrast *Easley* v. *Cromartie*, 532 U. S. 234, 241 (2001) (in a racial-gerrymandering claim, "[r]ace must not simply have been *a* motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the legislature's districting decision" (citation and internal quotation marks omitted)), with *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 265–266 (1977), and *Rogers* v. *Lodge*, 458 U. S. 613, 617 (1982). Whatever the validity of this distinction, on the facts of these cases it is irrelevant. The District Court's conclusion that the legislature was not racially motivated when it drew the plan as a whole, *Session*, 298 F. Supp. 2d, at 473, and when it split Webb County, *id.*, at 509, dooms appellants' intentional-vote-dilution claim.

We review a district court's factual finding of a legislature's motivation for clear error. See *Easley*, *supra*, at 242. We will not overturn that conclusion unless we are "'left with the definite and firm conviction that a mistake has been committed.'" *Anderson* v. *Bessemer City*, 470 U. S. 564, 573 (1985) (quoting *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948)). I cannot say that the District Court clearly erred when it found that "[t]he legislative motivation for the division of Webb County between Congressional District 23 and Congressional District 28 in Plan 1374C was political." *Session*, *supra*, at 509.

Appellants contend that the District Court had evidence of the State's intent to minimize Latino voting power. They note, for instance, that the percentage of Latinos in District 23's citizen voting-age population decreased significantly as a result of redistricting and that only 8 percent of Latinos had voted for Bonilla in the last election. They also point to testimony indicating that the legislature was conscious that protecting Bonilla would result in the removal of Latinos from the district and was pleased that, even after redistricting, he would represent a district in which a slight majority of voting-age residents was Latino. Of the individuals removed from District 23, 90 percent of those of voting age were Latinos, and 87 percent voted for Democrats in 2002. *Id.*, at 489. The District Court concluded that these individuals were removed because they voted for Democrats and against Bonilla, not because they were Latino. *Id.*, at 473, 508–510. This finding is entirely in accord with our case law, which has recognized that "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Hunt* v. *Cromartie*, 526 U. S. 541, 551 (1999). See also *Bush* v. *Vera*, 517 U. S. 952, 968 (1996) (plurality opinion) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify").[1] Appellants argue that in evaluating the State's stated motivation, the District

[1] The District Court did not find that the legislature had two motivations in dividing Webb County, one invidious and the other political, and that the political one predominated. Rather, it accepted the State's explanation that although the individuals moved were largely Latino, they were moved because they voted for Democrats and against Bonilla. For this reason, appellants' argument that incumbent protection cannot be a compelling state interest is off the mark. The District Court found that incumbent protection, not race, lay behind the redistricting of District 23. Strict scrutiny therefore does not apply, and the existence *vel non* of a compelling state interest is irrelevant.

Court improperly conflated race and political affiliation by failing to recognize that the individuals moved were not Democrats, they just voted against Bonilla. But the District Court found that the State's purpose was to protect Bonilla, and not just to create a safe Republican district. The fact that the redistricted residents voted against Bonilla (regardless of how they voted in other races) is entirely consistent with the legislature's political and nonracial objective.

I cannot find, under the clear error standard, that the District Court was required to reach a different conclusion. See *Hunt*, *supra*, at 551. "Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279 (1979) (citation, some internal quotation marks, and footnote omitted). The District Court cited ample evidence supporting its finding that the State did not remove Latinos from the district because they were Latinos: The new District 23 is more compact than it was under the old plan, see *Session*, 298 F. Supp. 2d, at 506, the division of Webb County simply followed the interstate highway, *id.*, at 509–510, and the district's "lines did not make twists, turns, or jumps that can be explained only as efforts to include Hispanics or exclude Anglos, or vice-versa," *id.*, at 511. Although appellants put forth alternative redistricting scenarios that would have protected Bonilla, the District Court noted that these alternatives would not have furthered the legislature's goal of increasing the number of Republicans elected statewide. *Id.*, at 497. See *Miller*, 515 U. S., at 915 ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests"). Nor is the District Court's finding at all impugned by the fact that certain legislators

were pleased that Bonilla would continue to represent a nominally Latino-majority district.

The ultimate inquiry, as in all cases under the Equal Protection Clause, goes to the State's purpose, not simply to the effect of state action. See *Washington* v. *Davis*, 426 U. S. 229, 238–241 (1976). Although it is true that the effect of an action can support an inference of intent, see *id.*, at 242, there is ample evidence here to overcome any such inference and to support the State's political explanation. The District Court did not commit clear error by accepting it.

B

The District Court's finding with respect to District 25 is another matter. There, too, the District Court applied the approach set forth in *Easley*, in which the Court held that race may be a motivation in redistricting as long as it is not the predominant one. 532 U. S., at 241. See also *Bush*, 517 U. S., at 993 (O'Connor, J., concurring) ("[S]o long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny"). In my view, however, when a legislature intentionally creates a majority-minority district, race is necessarily its predominant motivation and strict scrutiny is therefore triggered. See *id.*, at 999–1003 (THOMAS, J., joined by SCALIA, J., concurring in judgment). As in *Bush*, *id.*, at 1002, the State's concession here sufficiently establishes that the legislature classified individuals on the basis of their race when it drew District 25: "[T]o avoid retrogression and achieve compliance with § 5 of the Voting Rights Act . . . , the Legislature chose to create a new Hispanic-opportunity district—new CD 25—which would allow Hispanics to actually elect its candidate of choice." Brief for State Appellees 106. The District Court similarly found that "the Legislature clearly intended to create a majority Latino citizen vot-

ing age population district in Congressional District 25." *Session*, *supra*, at 511. Unquestionably, in my view, the drawing of District 25 triggers strict scrutiny.

Texas must therefore show that its use of race was narrowly tailored to further a compelling state interest. See *Shaw II*, 517 U. S., at 908. Texas asserts that it created District 25 to comply with its obligations under § 5 of the Voting Rights Act. Brief for State Appellees 105–106. That provision forbids a covered jurisdiction to promulgate any "standard, practice, or procedure" unless it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race." 42 U. S. C. § 1973c. The purpose of § 5 is to prevent "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U. S. 130, 141 (1976). Since its changes to District 23 had reduced Latino voting power in that district, Texas asserts that it needed to create District 25 as a Latino-opportunity district in order to avoid § 5 liability.

We have in the past left undecided whether compliance with federal antidiscrimination laws can be a compelling state interest. See *Miller*, *supra*, at 921; *Shaw II*, *supra*, at 911. I would hold that compliance with § 5 of the Voting Rights Act can be such an interest. We long ago upheld the constitutionality of § 5 as a proper exercise of Congress's authority under § 2 of the Fifteenth Amendment to enforce that Amendment's prohibition on the denial or abridgment of the right to vote. See *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966). If compliance with § 5 were not a compelling state interest, then a State could be placed in the impossible position of having to choose between compliance with § 5 and compliance with the Equal Protection Clause. Moreover, the compelling nature of the State's interest in § 5 compliance is supported by our recognition in previous cases that race may be used where necessary to remedy identified past discrimination. See, *e. g.*, *Shaw II*, *supra*, at 909 (citing

Richmond v. *J. A. Croson Co.*, 488 U. S. 469, 498–506 (1989)). Congress enacted § 5 for just that purpose, see *Katzenbach*, *supra*, at 309; *Beer*, *supra*, at 140–141, and that provision applies only to jurisdictions with a history of official discrimination, see 42 U. S. C. §§ 1973b(b), 1973c; *Vera* v. *Richards*, 861 F. Supp. 1304, 1317 (SD Tex. 1994) (recounting that, because of its history of racial discrimination, Texas became a jurisdiction covered by § 5 in 1975). In the proper case, therefore, a covered jurisdiction may have a compelling interest in complying with § 5.

To support its use of § 5 compliance as a compelling interest with respect to a particular redistricting decision, the State must demonstrate that such compliance was its "'actual purpose'" and that it had "'a strong basis in evidence' for believing," *Shaw II*, *supra*, at 908–909, n. 4 (citations omitted), that the redistricting decision at issue was "reasonably necessary under a constitutional reading and application of" the Act, *Miller*, 515 U. S., at 921.[2] Moreover, in order to tailor the use of race narrowly to its purpose of complying with the Act, a State cannot use racial considerations to achieve results beyond those that are required to comply with the statute. See *id.*, at 926 (rejecting the Department of Justice's policy that maximization of minority districts was required by § 5 and thus that this policy could serve as a compelling state interest). Section 5 forbids a State to take action that would worsen minorities' electoral opportunities; it does not require action that would improve them.

In determining whether a redistricting decision was reasonably necessary, a court must bear in mind that a State is permitted great flexibility in deciding how to comply with § 5's mandate. See *Georgia* v. *Ashcroft*, 539 U. S. 461, 479–483 (2003). For instance, we have recognized that § 5 does not constrain a State's choice between creating majority-minority districts or minority-influence districts. *Id.*, at

[2] No party here raises a constitutional challenge to § 5 as applied in these cases, and I assume its application is consistent with the Constitution.

480–483. And we have emphasized that, in determining whether a State has impaired a minority's "effective exercise of the electoral franchise," a court should look to the totality of the circumstances statewide. These circumstances include the ability of a minority group "to elect a candidate of its choice" or "to participate in the political process," the positions of legislative leadership held by individuals representing minority districts, and support for the new plan by the representatives previously elected from these districts. *Id.*, at 479–485.

In light of these many factors bearing upon the question whether the State had a strong evidentiary basis for believing that the creation of District 25 was reasonably necessary to comply with § 5, I would normally remand for the District Court to undertake that "fact-intensive" inquiry. See *id.*, at 484, 490. Appellants concede, however, that the changes made to District 23 "necessitated creating an additional effective Latino district elsewhere, in an attempt to avoid Voting Rights Act liability." Brief for Appellant Jackson et al. in No. 05–276, p. 44. This is, of course, precisely the State's position. Brief for State Appellees 105–106. Nor do appellants charge that in creating District 25 the State did more than what was required by § 5.[3] In light of these concessions, I do not believe a remand is necessary, and I would affirm the judgment of the District Court.

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[3] Appellants argue that in *Bush* v. *Vera*, 517 U. S. 952 (1996), we did not allow the purpose of incumbency protection in one district to justify the use of race in a neighboring district. That is not so. What we held in *Bush* was that the District Court had not clearly erred in concluding that, although the State had political incumbent-protection purposes as well, its use of race predominated. See *id.*, at 969 (plurality opinion). We then applied strict scrutiny, as I do here. But we said nothing more about incumbency protection as part of that analysis. Rather, we rejected the State's argument that compliance with § 5 was a compelling interest because the State had gone beyond mere nonretrogression. *Id.*, at 983; *id.*, at 1003 (THOMAS, J., joined by SCALIA, J., concurring in judgment).

Syllabus

BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS *v.* BANKS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04–1739. Argued March 27, 2006—Decided June 28, 2006

Pennsylvania houses its 40 most dangerous and recalcitrant inmates in a Long Term Segregation Unit. Inmates begin in level 2, which has the most severe restrictions, but may graduate to the less restrictive level 1. Plaintiff-respondent Banks, a level 2 inmate, filed this federal-court action against defendant-petitioner, the Secretary of the Department of Corrections (Secretary), alleging that a level 2 policy (Policy) forbidding inmates any access to newspapers, magazines, and photographs violates the First Amendment. During discovery, Banks deposed Deputy Prison Superintendent Dickson and the parties introduced prison policy manuals and related documents into the record. The Secretary then filed a summary judgment motion, along with a statement of undisputed facts and the deposition. Rather than filing an opposition to the motion, Banks filed a cross-motion for summary judgment, relying on the undisputed facts, including those in the deposition. Based on this record, the District Court granted the Secretary's motion and denied Banks'. Reversing the Secretary's summary judgment award, the Third Circuit held that the prison regulation could not be supported as a matter of law.

Held: The judgment is reversed, and the case is remanded.

399 F. 3d 134, reversed and remanded.

JUSTICE BREYER, joined by THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE SOUTER, concluded that, based on the record before this Court, prison officials have set forth adequate legal support for the Policy, and Banks has failed to show specific facts that could warrant a determination in his favor. Pp. 528–536.

(a) *Turner* v. *Safley*, 482 U. S. 78, and *Overton* v. *Bazzetta*, 539 U. S. 126, contain the basic substantive legal standards covering this case. While imprisonment does not automatically deprive a prisoner of constitutional protections, *Turner*, 482 U. S., at 93, the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere, *id.*, at 84–85. As *Overton*, *supra*, at 132, pointed out, courts

also owe "substantial deference to the professional judgment of prison administrators." Under *Turner*, restrictive prison regulations are permissible if they are "reasonably related to legitimate penological interests." 482 U. S., at 89. Because this case is here on the Secretary's summary judgment motion, the Court examines the record to determine whether he has demonstrated "the absence of a genuine issue of material fact," *Celotex Corp.* v. *Catrett*, 477 U. S. 317, 323, and his entitlement to judgment as a matter of law. See, *e. g.*, Fed. Rule Civ. Proc. 56(c). If he has, the Court determines whether Banks has, "by affidavits or as otherwise provided" in Rule 56, "set forth specific facts showing . . . a genuine issue for trial," Rule 56(e). Inferences about disputed facts must be drawn in Banks' favor, but deference must be accorded prison authorities' views with respect to matters of professional judgment. Pp. 528–530.

(b) The Secretary rested his motion primarily on the undisputed facts statement and Dickson's affidavit. The first of his justifications for the Policy—the need to motivate better behavior on the part of particularly difficult prisoners—sufficiently satisfies *Turner*'s requirements. The statement and affidavit set forth a "'valid, rational connection'" between the Policy and "legitimate penological interests," 482 U. S., at 89, 95. Dickson noted that prison authorities are limited in what they can and cannot deny or give a level 2 inmate, who has already been deprived of most privileges, and that the officials believe that the specified items are legitimate as incentives for inmate growth. The undisputed facts statement added that the Policy encourages progress and discourages backsliding by level 1 inmates. These statements point to evidence that the regulations serve the function identified. The articulated connections between newspapers and magazines, the deprivation of virtually the last privilege left to an inmate, and a significant incentive to improve behavior, are logical ones. Thus, this factor supports the Policy's "reasonableness." The second, third, and fourth *Turner* factors—whether there are "alternative means of exercising the right that remain open to prison inmates," *id.*, at 90; the "impact" that accommodating "the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources," *ibid.*; and whether there are "ready alternatives" for furthering the governmental interest, *ibid.*—add little to the first factor's logical rationale here. That two of these three factors seem to favor the Policy therefore does not help the Secretary. The real task in this case is not balancing the *Turner* factors but determining whether the Secretary's summary judgment material shows not just a logical relation but a *reasonable* relation. Given the deference courts must show to prison officials' professional judgment, the material presented here is sufficient. *Overton* provides sig-

nificant support for this conclusion. In both cases, the deprivations (family visits in *Overton* and access to newspapers, magazines, and photographs here) have an important constitutional dimension; prison officials have imposed the deprivation only upon those with serious prison-behavior problems; and those officials, relying on their professional judgment, reached an experience-based conclusion that the policies help to further legitimate prison objectives. Unless there is more, the Secretary's supporting material brings the Policy within *Turner*'s scope. Pp. 530–533.

(c) Although summary judgment rules gave Banks an opportunity to respond to these materials, he did not do so in the manner the rules provide. Instead, he filed a cross-motion for summary judgment, arguing that the Policy fell of its own weight. Neither the cases he cites nor the statistics he notes support his argument. In reaching a contrary conclusion, the Third Circuit placed too high an evidentiary burden on the Secretary and offered too little deference to the prison officials' judgment. Such deference does not make it impossible for those attacking prison policies to succeed. A prisoner may be able to marshal substantial evidence, for example, through depositions, that a policy is not reasonable or that there is a genuine issue of material fact for trial. And, as *Overton* noted, if faced with a *de facto* permanent ban involving a severe restriction, this Court might reach a different conclusion. Pp. 534–536.

JUSTICE THOMAS, joined by JUSTICE SCALIA, concluded that, using the framework set forth in JUSTICE THOMAS' concurrence in *Overton* v. *Bazzetta*, 539 U. S. 126, 138, Pennsylvania's prison regulations are permissible. That framework provides the least perilous approach for resolving challenges to prison regulations and is the approach most faithful to the Constitution. "Sentencing a criminal to a term of imprisonment may . . . carry with it the implied delegation to prison officials to discipline and otherwise supervise the criminal while he is incarcerated." *Id.*, at 140, n. A term of imprisonment in Pennsylvania includes such an implied delegation. Inmates are subject to Department of Corrections rules and disciplinary rulings, and the challenged regulations fall with the department's discretion. This conclusion is supported by the plurality's *Turner* v. *Safley*, 482 U. S. 78, analysis. The "history of incarceration as punishment [also] supports the view that the sentenc[e] . . . terminated" respondent's unfettered right to magazines, newspapers, and photographs. *Overton*, 539 U. S., at 142 (THOMAS, J., concurring in judgment). While Pennsylvania "is free to alter its definition of incarceration to include the retention" of unfettered access to such materials, it appears that the Commonwealth instead sentenced respondent against the backdrop of its traditional

conception of imprisonment, which affords no such privileges. *Id.*, at 144–145. Pp. 536–542.

BREYER, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and KENNEDY and SOUTER, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, *post*, p. 536. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 542. GINSBURG, J., filed a dissenting opinion, *post*, p. 553. ALITO, J., took no part in the consideration or decision of the case.

Louis J. Rovelli, Executive Deputy Attorney General of Pennsylvania, argued the cause for petitioner. With him on the briefs were *Thomas W. Corbett, Jr.*, Attorney General, *Calvin R. Koons* and *Kemal A. Mericli*, Senior Deputy Attorneys General, and *John G. Knorr III*, Chief Deputy Attorney General.

Jonathan L. Marcus argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Clement*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Garre*, *Sri Srinivasan*, *Barbara L. Herwig*, and *Edward Himmelfarb*.

Jere Krakoff argued the cause for respondent. With him on the brief was *Andrew Shubin*.*

JUSTICE BREYER announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE SOUTER join.

We here consider whether a Pennsylvania prison policy that "denies newspapers, magazines, and photographs" to a

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**Richard Ruda* and *James I. Crowley* filed a brief for the Council of State Governments et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *David C. Fathi*, *Elizabeth Alexander*, *Steven R. Shapiro*, *Witold J. Walczak*, *Steven Banks*, *John Boston*, and *Elliot M. Mincberg*; for the Becket Fund for Religious Liberty by *Anthony R. Picarello, Jr.*; for Prison Legal News et al. by *Sanford Jay Rosen*, *Lucy A. Dalglish*, *Gregg P. Leslie*, and *Michael A. Bamberger*; and for Lumumba Kenyatta Incumaa by *Justin S. Antonipillai*.

group of specially dangerous and recalcitrant inmates "violate[s] the First Amendment." Brief for Petitioner i; see *Turner* v. *Safley*, 482 U. S. 78, 89 (1987) (prison rules restricting a prisoner's constitutional rights must be "reasonably related to legitimate penological interests"). The case arises on a motion for summary judgment. While we do not deny the constitutional importance of the interests in question, we find, on the basis of the record now before us, that prison officials have set forth adequate legal support for the policy. And the plaintiff, a prisoner who attacks the policy, has failed to set forth "specific facts" that, in light of the deference that courts must show to the prison officials, could warrant a determination in his favor. Fed. Rule Civ. Proc. 56(e); *Overton* v. *Bazzetta*, 539 U. S. 126, 132 (2003) (need for "substantial deference to the professional judgment of prison administrators").

I

A

The prison regulation at issue applies to certain prisoners housed in Pennsylvania's Long Term Segregation Unit. The LTSU is the most restrictive of the three special units that Pennsylvania maintains for difficult prisoners. The first such unit, the "Restricted Housing Unit" (RHU), is designed for prisoners who are under disciplinary sanction or who are assigned to administrative segregation. App. 80. The second such unit, the "Special Management Unit" (SMU), is intended for prisoners who "exhibit behavior that is continually disruptive, violent, dangerous or a threat to the orderly operation of their assigned facility." *Ibid.* The third such unit, the LTSU, is reserved for the Commonwealth's "most incorrigible, recalcitrant inmates." *Id.*, at 25.

LTSU inmates number about 40. *Id.*, at 127. Most, but not all, have "flunked out" of the SMU program. *Id.*, at 137. To qualify, they must have met one or more of the following conditions: failure to "complete" the SMU program; "assault-

ive behavior with the intent to cause death or serious bodily injury"; causing injury to other inmates or staff; "engaging in facility disturbance(s)"; belonging to an unauthorized organization or "Security Threat Group"; engaging in criminal activity that "threatens the community"; possessing while in prison "weapons" or "implements of escape"; or having a history of "serious" escape attempts, "exerting negative influence in facility activities," or being a "sexual predator." *Id.*, at 85–86. The LTSU is divided into two levels. All inmates are initially assigned to the most restrictive level, level 2. After 90 days, depending upon an inmate's behavior, an individual may graduate to the less restrictive level 1, although in practice most do not. *Id.*, at 131–132, 138.

The RHU, SMU, and LTSU all seriously restrict inmates' ordinary prison privileges. At all three units, residents are typically confined to cells for 23 hours a day, have limited access to the commissary or outside visitors, and (with the exception of some phases of the SMU) may not watch television or listen to the radio. *Id.*, at 102; Brief for Petitioner 2–4.

Prisoners at level 2 of the LTSU face the most severe form of the restrictions listed above. They have no access to the commissary, they may have only one visitor per month (an immediate family member), and they are not allowed phone calls except in emergencies. App. 102. In addition they (unlike all other prisoners in the Commonwealth) are restricted in the manner at issue here: They have no access to newspapers, magazines, or personal photographs. *Id.*, at 26. They are nonetheless permitted legal and personal correspondence, religious and legal materials, two library books, and writing paper. *Id.*, at 35, 102, 169. If an inmate progresses to level 1, he enjoys somewhat less severe restrictions, including the right to receive one newspaper and five magazines. *Id.*, at 26, 102. The ban on photographs is not lifted unless a prisoner progresses out of the LTSU altogether. *Ibid.*

B

In 2001, plaintiff Ronald Banks, respondent here, then a prisoner confined to LTSU level 2, filed this federal-court action against Jeffrey Beard, the Secretary of the Pennsylvania Department of Corrections. See Rev. Stat. § 1979, 42 U. S. C. § 1983. Banks claimed that the level 2 policy (Policy) forbidding inmates all access to newspapers, magazines, and photographs bears no reasonable relation to any legitimate penological objective and consequently violates the First Amendment. App. 15; see also *Turner, supra; Overton, supra.* The Secretary, the defendant, petitioner here, filed an answer. The District Court certified a class composed of similar level 2 inmates, and the court assigned the case to a Magistrate who conducted discovery.

Banks' counsel deposed a deputy superintendent at the prison, Joel Dickson. The parties introduced various prison policy manuals and related documents into the record. And at that point the Secretary filed a motion for summary judgment. He also filed a "Statement of Material Facts Not in Dispute," with a copy of the deputy superintendent's deposition attached as an appendix. See App. 25; Rule 56.1(C)(1) (WD Pa. 2006).

Banks (who was represented by counsel throughout) filed no opposition to the Secretary's motion, but instead filed a cross-motion for summary judgment. Neither that cross-motion nor any other of Banks' filings sought to place any significant fact in dispute, and Banks has never sought a trial to determine the validity of the Policy. Rather, Banks claimed in his cross-motion that the undisputed facts, including those in Dickson's deposition, entitled him to summary judgment. In this way, and by failing specifically to challenge the facts identified in the defendant's statement of undisputed facts, Banks is deemed to have admitted the validity of the facts contained in the Secretary's statement. See Rule 56.1(E).

On the basis of the record as described (the complaint, the answer, the statement of undisputed facts, other agreed-upon descriptions of the system, the Dickson deposition, and the motions for summary judgment), the Magistrate recommended that the District Court grant the Secretary's motion for summary judgment and deny that of Banks. App. to Brief in Opposition 130. The District Court accepted the Magistrate's recommendation. *Id.*, at 131–132.

On appeal, a divided Third Circuit panel reversed the District Court's award of summary judgment to the Secretary. 399 F. 3d 134 (2005). The majority of the panel held that the prison regulation "cannot be supported as a matter of law by the record in this case." *Id.*, at 148; see also *infra*, at 536. The Secretary sought our review of the appeals court's judgment, and we granted his petition. 546 U. S. 1015 (2005).

II

Turner v. *Safley*, 482 U. S. 78 (1987), and *Overton* v. *Bazzetta*, 539 U. S. 126 (2003), contain the basic substantive legal standards governing this case. This Court recognized in *Turner* that imprisonment does not automatically deprive a prisoner of certain important constitutional protections, including those of the First Amendment. 482 U. S., at 93; see also *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 348 (1987). But at the same time the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere. See, *e. g.*, *Turner*, *supra*, at 84–85. As *Overton* (summarizing pre-*Turner* case law) pointed out, courts owe "substantial deference to the professional judgment of prison administrators." 539 U. S., at 132. And *Turner* reconciled these principles by holding that restrictive prison regulations are permissible if they are "'reasonably related' to legitimate penological interests," 482 U. S., at 87, and are not an "'exaggerated response'" to such objectives, *ibid.*

Turner also sets forth four factors "relevant in determining the reasonableness of the regulation at issue." *Id.*, at 89. First, is there a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"? *Ibid.* Second, are there "alternative means of exercising the right that remain open to prison inmates"? *Id.*, at 90. Third, what "impact" will "accommodation of the asserted constitutional right . . . have on guards and other inmates, and on the allocation of prison resources generally"? *Ibid.* And, fourth, are "ready alternatives" for furthering the governmental interest available? *Ibid.*

This case has arrived in this Court in the context of the Secretary's motion for summary judgment. Thus we must examine the record to see whether the Secretary, in depositions, answers to interrogatories, admissions, affidavits and the like, has demonstrated "the absence of a genuine issue of material fact," *Celotex Corp.* v. *Catrett*, 447 U. S. 317, 323 (1986), and his entitlement to judgment as a matter of law. See, *e. g.*, Fed. Rule Civ. Proc. 56(c).

If the Secretary has done so, then we must determine whether Banks, the plaintiff, who bears the burden of persuasion, *Overton*, *supra*, at 132, has "by affidavits or as otherwise provided" in Rule 56 (*e. g.*, through depositions, etc.) "*set forth specific facts showing that there is a genuine issue for trial.*" Rule 56(e) (emphasis added). If not, the law requires entry of judgment in the Secretary's favor. See *Celotex Corp.*, *supra*, at 322 (Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial").

We recognize that at this stage we must draw "all justifiable inferences" in Banks' "favor." *Anderson* v. *Liberty*

Lobby, Inc., 477 U. S. 242, 255 (1986). In doing so, however, we must distinguish between evidence of disputed facts and disputed matters of professional judgment. In respect to the latter, our inferences must accord deference to the views of prison authorities. *Overton, supra.* Unless a prisoner can point to sufficient evidence regarding such issues of judgment to allow him to prevail on the merits, he cannot prevail at the summary judgment stage.

III

The Secretary in his motion set forth several justifications for the prison's policy, including the need to motivate better behavior on the part of particularly difficult prisoners, the need to minimize the amount of property they control in their cells, and the need to ensure prison safety, by, for example, diminishing the amount of material a prisoner might use to start a cell fire. We need go no further than the first justification, that of providing increased incentives for better prison behavior. Applying the well-established substantive and procedural standards set forth in Part II, we find, on the basis of the record before us, that the Secretary's justification is adequate. And that finding here warrants summary judgment in the Secretary's favor.

A

The Secretary rested his motion for summary judgment primarily upon the statement of undisputed facts along with Deputy Prison Superintendent Dickson's affidavit. The statement of undisputed facts says that the LTSU's 40 inmates, about 0.01 percent of the total prison population, constitute the "'worst of the worst,'" those who "have proven by the history of their behavior in prison, the necessity of holding them in the rigorous regime of confinement" of the LTSU. App. 26. It then sets forth three "penological rationales" for the Policy, summarized from the Dickson deposition:

(1) to "motivat[e]" better "behavior" on the part of these "particularly difficult prisoners," by providing them with an incentive to move to level 1, or out of the LTSU altogether, and to "discourage backsliding" on the part of level 1 inmates;

(2) to minimize the amount of property controlled by the prisoners, on the theory that the "less property these high maintenance, high supervision, obdurate troublemakers have, the easier it is for . . . correctional officer[s] to detect concealed contraband [and] to provide security"; and

(3) to diminish the amount of material (in particular newspapers and magazines) that prisoners might use as weapons of attack in the form of "'spears'" or "'blow guns,'" or that they could employ "as tools to catapult feces at the guards without the necessity of soiling one's own hands," or use "as tinder for cell fires." *Id.*, at 27.

As we have said we believe that the first rationale itself satisfies *Turner*'s requirements. First, the statement and deposition set forth a "'valid, rational connection'" between the Policy and "'legitimate penological objectives.'" 482 U. S., at 89, 95. The deputy superintendent stated in his deposition that prison authorities are "very limited . . . in what we can and cannot deny or give to [a level 2] inmate [who typically has already been deprived of almost all privileges, see *supra*, at 526], and these are some of the items that we feel are legitimate as incentives for inmate growth." App. 190. The statement of undisputed facts (relying on the deposition) added that the Policy "serves to encourage . . . progress and discourage backsliding by the level 1 inmates." *Id.*, at 27.

These statements point to evidence—namely, the views of the deputy superintendent—that the regulations do, in fact, serve the function identified. The articulated connections between newspapers and magazines, the deprivation of virtually the last privilege left to an inmate, and a significant

incentive to improve behavior, are logical ones. Thus, the first factor supports the Policy's "reasonableness."

As to the second factor, the statement and deposition make clear that, as long as the inmate remains at level 2, *no* "alternative means of exercising the right" remain open to him. *Turner*, *supra*, at 90. After 90 days the prisoner may be able to graduate to level 1 and thus regain his access to most of the lost rights. In the approximately two years after the LTSU opened, about 25 percent of those confined to level 2 did graduate to level 1 or out of the LTSU altogether. App. 138; Reply Brief for Petitioner 8. But these circumstances simply limit, they do not eliminate, the fact that there is no alternative. The absence of any alternative thus provides "some evidence that the regulations [a]re unreasonable," but is not "conclusive" of the reasonableness of the Policy. *Overton*, 539 U. S., at 135.

As to the third factor, the statement and deposition indicate that, were prison authorities to seek to "accommodat[e] . . . the asserted constitutional right," the resulting "impact" would be negative. *Turner*, 482 U. S., at 90. That circumstance is also inherent in the nature of the Policy: If the Policy (in the authorities' view) helps to produce better behavior, then its absence (in the authorities' view) will help to produce worse behavior, *e. g.*, "backsliding" (and thus the expenditure of more "resources" at level 2). *Ibid.* Similarly, as to the fourth factor, neither the statement nor the deposition describes, points to, or calls to mind any "alternative method of accommodating the claimant's constitutional complaint . . . that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests." *Id.*, at 90–91.

In fact, the second, third, and fourth factors, being in a sense logically related to the Policy itself, here add little, one way or another, to the first factor's basic logical rationale. See *post*, at 547 (STEVENS, J., dissenting) (noting that "depri-

vation theory does not map easily onto several of the *Turner* factors"), cf. *post*, at 540–542 (THOMAS, J., concurring in judgment) (similar). The fact that two of these latter three factors seem to support the Policy does not, therefore, count in the Secretary's favor. The real task in this case is not balancing these factors, but rather determining whether the Secretary shows more than simply a logical relation, that is, whether he shows a *reasonable* relation. We believe the material presented here by the prison officials is sufficient to demonstrate that the Policy is a reasonable one.

Overton provides significant support for this conclusion. In *Overton* we upheld a prison's "severe" restriction on the family visitation privileges of prisoners with repeat substance abuse violations. 539 U. S., at 134. Despite the importance of the rights there at issue, we held that withholding such privileges "is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose." *Ibid.*

The Policy and circumstances here are not identical, but we have not found differences that are significant. In both cases, the deprivations at issue (all visits with close family members; all access to newspapers, magazines, and photos) have an important constitutional dimension. In both cases, prison officials have imposed the deprivation at issue only upon those with serious prison-behavior problems (here the 40 most intractable inmates in the Commonwealth). In both cases, prison officials, relying on their professional judgment, reached an experience-based conclusion that the policies help to further legitimate prison objectives.

The upshot is that, if we consider the Secretary's supporting materials (*i. e.*, the statement and deposition), by themselves, they provide sufficient justification for the Policy. That is to say, unless there is more, they bring the Policy within *Turner*'s legitimating scope.

B

Although summary judgment rules provided Banks with an opportunity to respond to the Secretary's materials, he did not offer any fact-based or expert-based refutation in the manner the rules provide. Fed. Rule Civ. Proc. 56(e) (requiring plaintiff through, *e. g.*, affidavits, etc., to "s*et forth specific facts showing that there is a genuine issue for trial*" (emphasis added)). Instead, Banks filed his own cross-motion for summary judgment in which he claimed that the Policy fell of its own weight, *i. e.*, that the Policy was "unreasonable as a matter of law." Plaintiffs' Brief in Support of Motion for Summary Judgment in No. C. A. 01–1956 (WD Pa.), p. 13 (hereinafter Plaintiffs' Brief). In particular, Banks argued (and continues to argue) that the Policy lacks any significant incentive effect given the history of incorrigibility of the inmates concerned and the overall deprivations associated with the LTSU, Brief for Respondent 22; Plaintiffs' Brief 13. He points in support to certain court opinions that he believes reflect expert views that favor his position. *Abdul Wali* v. *Coughlin*, 754 F. 2d 1015, 1034 (CA2 1985); *Bieregu* v. *Reno*, 59 F. 3d 1445, 1449 (CA3 1995); *Knecht* v. *Collins*, 903 F. Supp. 1193, 1200 (SD Ohio 1995), aff'd in part, rev'd in part, vacated in part, 187 F. 3d 636 (CA6 1999). And he adds that only about one-quarter of level 2 inmates graduate out of that environment.

The cases to which Banks refers, however, simply point out that, in the view of some courts, increased contact with the world generally favors rehabilitation. See *Abdul Wali*, *supra*, at 1034; *Bieregu*, *supra*, at 1449; *Knecht*, *supra*, at 1200. That circumstance, as written about in court opinions, cannot provide sufficient support, particularly as these courts were not considering contexts such as this one, where prison officials are dealing with especially difficult prisoners. Neither can Banks find the necessary assistance in the fact that only one-quarter or so of the level 2 population graduates to level 1 or out of the LTSU. Given the incorrigibility

of level 2 inmates—which petitioner himself admits—there is nothing to indicate that a 25 percent graduation rate is low, rather than, as the Secretary suggests, acceptably high.

We recognize that the Court of Appeals reached a contrary conclusion. But in doing so, it placed too high an evidentiary burden upon the Secretary. In respect to behavior-modification incentives, for example, the court wrote that the "District Court did not examine . . . whether the ban was implemented in a way that could modify behavior, or inquire into whether the [Department of Corrections'] deprivation theory of behavior modification had any basis in real human psychology, or had proven effective with LTSU inmates." 399 F. 3d, at 142. And, the court phrased the relevant conclusions in terms that placed a high summary judgment evidentiary burden upon the Secretary, *i. e.*, the moving party. See, *e. g.*, *id.*, at 141 ("[W]e cannot say that the [defendant] has shown how the regulations in this case serve [an incentive-related] purpose"). The court's statements and conclusions here also offer too little deference to the judgment of prison officials about such matters. The court, for example, offered no apparent deference to the deputy prison superintendent's professional judgment that the Policy deprived "particularly difficult" inmates of a last remaining privilege and that doing so created a significant behavioral incentive.

Contrary to JUSTICE GINSBURG's suggestion, *post*, at 554–556 (dissenting opinion), we do not suggest that the deference owed prison authorities makes it impossible for prisoners or others attacking a prison policy like the present one ever to succeed or to survive summary judgment. After all, the constitutional interest here is an important one. *Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective. A prisoner may be able to marshal substantial evidence that, given the importance of the interest, the Policy is not a reasonable one. Cf. 482 U. S., at 97–99 (striking

down prison policy prohibiting prisoner marriages). And with or without the assistance that public interest law firms or clinics may provide, it is not inconceivable that a plaintiff's counsel, through rigorous questioning of officials by means of depositions, could demonstrate genuine issues of fact for trial. Finally, as in *Overton*, we agree that "the restriction is severe," and "if faced with evidence that [it were] a *de facto* permanent ban . . . we might reach a different conclusion in a challenge to a particular application of the regulation." 539 U. S., at 134. That is not, however, the case before us.

Here prison authorities responded adequately through their statement and deposition to the allegations in the complaint. And the plaintiff failed to point to "'specific facts'" in the record that could "lead a rational trier of fact to find" in his favor. *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 587 (1986) (quoting Fed. Rule Civ. Proc. 56(e)).

The judgment of the Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of this case.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

Judicial scrutiny of prison regulations is an endeavor fraught with peril. Just last Term, this Court invalidated California's policy of racially segregating prisoners in its reception centers, notwithstanding that State's warning that its policy was necessary to prevent prison violence. See *Johnson* v. *California*, 543 U. S. 499 (2005). California subsequently experienced several instances of severe race-based prison violence, including a riot that resulted in 2 fatalities and more than 100 injuries, and significant fighting along ra-

cial lines between newly arrived inmates, the very inmates that were subject to the policy invalidated by the Court in *Johnson*. See Winton & Bernstein, More Violence Erupts at Pitchess; Black and Latino inmates clash at the north county jail, leaving 13 injured, Los Angeles Times, Mar. 1, 2006, Metro Desk, p. B1. This powerful reminder of the grave dangers inherent in prison administration confirms my view that the framework I set forth in *Overton* v. *Bazzetta*, 539 U. S. 126, 138 (2003) (opinion concurring in judgment), is the least perilous approach for resolving challenges to prison regulations, as well as the approach that is most faithful to the Constitution. Accordingly, I concur only in the judgment of the Court.

I

Both the plurality and JUSTICE STEVENS' dissent evaluate the regulations challenged in this case pursuant to the approach set forth in *Turner* v. *Safley*, 482 U. S. 78 (1987), which permits prison regulations that "imping[e] on inmates' constitutional rights" if the regulations are "reasonably related to legitimate penological interests." *Id.*, at 89. But as I explained in *Overton*, *Turner* and its progeny "rest on the unstated (and erroneous) presumption that the Constitution contains an implicit definition of incarceration." *Overton*, 539 U. S., at 139 (opinion concurring in judgment). Because the Constitution contains no such definition, "States are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations—*provided only that those deprivations are consistent with the Eighth Amendment.*" *Ibid.* (emphasis in original). Respondent has not challenged Pennsylvania's prison policy as a violation of the Eighth Amendment, and thus the sole inquiry in this case is whether respondent's sentence deprived him of the rights he now seeks to exercise. *Id.*, at 140.

"Whether a sentence encompasses the extinction of a constitutional right enjoyed by free persons turns on state law,

for it is a State's prerogative to determine how it will punish violations of its law." *Ibid.*[1] Although the question whether Pennsylvania intended to confer upon respondent and other inmates a right to have unfettered access to newspapers, magazines, and photographs is thus "ultimately for the State itself to answer," in the absence of a resolution of that question by the Pennsylvania Supreme Court, we must resolve it in the instant case. *Id.*, at 141. Fortunately, the answer is straightforward.

In *Overton*, I explained:

> "Sentencing a criminal to a term of imprisonment may, under state law, carry with it the implied delegation to prison officials to discipline and otherwise supervise the criminal while he is incarcerated. Thus, restrictions imposed by prison officials may also be a part of the sentence, provided that those officials are not acting ultra vires with respect to the discretion given them, by implication, in the sentence." *Id.*, at 140, n.

A term of imprisonment in Pennsylvania includes such an implied delegation. Pennsylvania inmates are subject to the rules and disciplinary measures set forth by the Pennsylvania Department of Corrections. See, *e. g.*, Inmate Discipline, Policy No. DC–ADM 801 (2004), http://www.cor.state.pa.us /standards/lib/standards/DC-ADM_801_Inmate_Discipline.pdf (as visited June 12, 2006, and available in Clerk of Court's case file). And no one disputes that the regulations challenged in the instant litigation fall within the

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[1] As in *Overton*, respondent has not asked this Court to abstain from resolving his constitutional challenge under *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U. S. 496 (1941) (holding that federal courts should ordinarily abstain where the resolution of a federal constitutional issue may be rendered irrelevant by the determination of a predicate state-law question), and the issue of *Pullman* abstention was not considered below. As a result, respondent has "submitted to the sort of guesswork about the meaning of prison sentences that is the hallmark of the *Turner* inquiry." *Overton*, 539 U. S., at 141 (THOMAS, J., concurring in judgment).

discretion given to the Department of Corrections. As in *Overton*, the conclusion that these regulations are included in the prison sentence is strongly supported by the plurality's *Turner* analysis. A prison policy that has a "valid, rational connection [to] the . . . legitimate penological objectives" of improving prison security and discouraging inmate misbehavior, *ante*, at 531 (internal quotation marks omitted), "that [is] designed to avoid adverse impacts on guards, inmates, or prison resources, [and] that cannot be replaced by 'ready alternatives,' [is] presumptively included within a sentence of imprisonment," *Overton*, 539 U. S., at 141–142 (THOMAS, J., concurring in judgment).

The "history of incarceration as punishment [also] supports the view that the sentenc[e] imposed on responden[t] terminated" his unfettered right to magazines, newspapers, and photographs. *Id.*, at 142. As I explained in *Overton*, imprisonment as punishment "became standardized in the period between 1780 and 1865," *id.*, at 143 (citing McGowen, The Well-Ordered Prison: England, 1780–1865, in The Oxford History of the Prison: The Practice of Punishment in Western Society 79 (N. Morris & D. Rothman eds. 1995)), and was distinguished by the prisoner's isolation from the outside world, 539 U. S., at 143. Indeed, both the Pennsylvania and Auburn prison models, which formed the basis for prison systems throughout the Nation in the early 1800's, imposed this isolation specifically by denying prisoners access to reading materials and contact with their families. Rothman, Perfecting the Prison: United States, 1789–1865, in The Oxford History of the Prison, at 111, 117; see also *id.*, at 118 (explaining that in the Pennsylvania system, inmates were "given nothing to read except the Bible and were prevented from corresponding with friends and family"); S. Christianson, With Liberty for Some: 500 Years of Imprisonment in America 145 (1998) (explaining that in Sing Sing, the standard bearer for the Auburn model, no reading materials of any kind, except the Bible, were allowed inside). Even as the advent of

prison libraries increased prisoners' access to reading materials, that access was universally "subject to some form of censorship," such that "inmates of correctional institutions are denied access to books which are freely available to the rest of the community." G. Bramley, Outreach: Library Services for the Institutionalised, the Elderly, and the Physically Handicapped 91, 93 (1978).

Although Pennsylvania "is free to alter its definition of incarceration to include the retention" of unfettered access to magazines, newspapers, and photographs, it appears that the Commonwealth instead sentenced respondent against the backdrop of its traditional conception of imprisonment, which affords no such privileges. *Overton, supra,* at 144–145 (THOMAS, J., concurring in judgment). Accordingly, respondent's challenge to Pennsylvania's prison regulations must fail.

II

This case reveals the shortcomings of the *Turner* framework, at least insofar as that framework is applied to prison regulations that seek to modify inmate behavior through privilege deprivation. In applying the first *Turner* factor, the plurality correctly observes that Pennsylvania's policy of depriving its most incorrigible inmates of their last few remaining privileges bears a "valid, rational connection" to the "legitimate penological objectiv[e]" of "encourag[ing] progress and discourag[ing] backsliding" of inmate compliance with prison rules. *Ante,* at 531 (internal quotation marks omitted). Indeed, this Court has previously determined that "[w]ithdrawing . . . privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners." *Overton, supra,* at 134.[2]

[2] In my view, this legal conclusion, combined with the deference to the judgment of prison officials required under *Turner,* see *ante,* at 528–530, would entitle prison officials to summary judgment against challenges to their inmate prison deprivation policies in virtually every case. In this

Although policies, such as Pennsylvania's, that seek to promote compliance with prison rules by withdrawing various privileges may always satisfy *Turner*'s first factor, they necessarily fail its second factor. Such policies, by design, do not provide an "alternative means" for inmates to exercise the rights they have been deprived. 482 U. S., at 90. The "legitimate penological objectiv[e]" of encouraging compliance with prison rules by depriving misbehaving inmates of various privileges simply cannot be accomplished if prison officials are required to provide prisoners with an alternative and equivalent set of privileges. Thus, the plurality's observation that respondent's privileges may be restored in response to continued, improved behavior is simply irrelevant to the second factor of *Turner*, which asks only "whether . . . alternative means of exercising the right . . . remain open to prison inmates." *Ibid.* The answer in the context of privilege deprivation policies is always no, thus demonstrating the difficulty of analyzing such policies under the *Turner* framework.

The third and fourth *Turner* factors are likewise poorly suited to determining the validity of inmate privilege deprivation policies. When the "valid penological objectiv[e]" of a prison policy is encouraging compliance with prison rules, it makes little sense to inquire into "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," or into the availability of "ready alternatives." *Ibid.* At best, such inquiries merely collapse the third and fourth factors into the first, because accommodating the exercise of the deprived right will undermine the incentive effects of the prison policy and because the unavailability of "ready alternatives" is typically (as in this case) one of the

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context, it is highly unlikely a prisoner could establish that the "connection between the regulation and the asserted goal is arbitrary or irrational." *Shaw* v. *Murphy*, 532 U. S. 223, 229 (2001) (internal quotation marks omitted).

underlying rationales for the adoption of inmate privilege deprivation policies.

* * *

Because the prison regulations at issue today are permissible under the approach I explained in *Overton*, I concur in the judgment of the Court.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

By ratifying the Fourteenth Amendment, our society has made an unmistakable commitment to apply the rule of law in an evenhanded manner to all persons, even those who flagrantly violate their social and legal obligations. Thus, it is well settled that even the "'worst of the worst,'" *ante*, at 530, prisoners retain constitutional protection, specifically including their First Amendment rights. See, *e. g.*, *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 348 (1987). When a prison regulation impinges upon First Amendment freedoms, it is invalid unless "it is reasonably related to legitimate penological interests." *Turner* v. *Safley*, 482 U. S. 78, 89 (1987). Under this standard, a prison regulation cannot withstand constitutional scrutiny if "the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational," *id.*, at 89–90, or if the regulation represents an "exaggerated response" to legitimate penological objectives, *id.*, at 98.

In this case, Pennsylvania prison officials have promulgated a rule that prohibits inmates in Long Term Segregation Unit, level 2 (LTSU–2), which is the most restrictive condition of confinement statewide, from possessing any secular, nonlegal newspaper, newsletter, or magazine during the indefinite duration of their solitary confinement. A prisoner in LTSU–2 may not even receive an individual article clipped from such a news publication unless the article relates to him or his family. In addition, under the challenged rule, *any* personal photograph, including those of spouses, children, de-

ceased parents, or inspirational mentors, will be treated as contraband and confiscated. See App. 176.

It is indisputable that this prohibition on the possession of newspapers and photographs infringes upon respondent's First Amendment rights. "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought . . . ." *Griswold* v. *Connecticut*, 381 U. S. 479, 482 (1965) (citation omitted). See also *Kaplan* v. *California*, 413 U. S. 115, 119–120 (1973) (explaining that photographs, like printed materials, are protected by the First Amendment). Plainly, the rule at issue in this case strikes at the core of the First Amendment rights to receive, to read, and to think.

Petitioner does not dispute that the prohibition at issue infringes upon rights protected by the First Amendment. Instead, petitioner posits two penological interests, which, in his view, are sufficient to justify the challenged rule notwithstanding these constitutional infringements: prison security and inmate rehabilitation. Although these interests are certainly valid, petitioner has failed to establish, as a matter of law, that the challenged rule is reasonably related to these interests. Accordingly, the Court of Appeals properly denied petitioner's motion for summary judgment, and this Court errs by intervening to prevent a trial.

Turning first to the security rationale, which the plurality does not discuss, the Court of Appeals persuasively explained why, in light of the amount of materials LTSU–2 inmates may possess in their cells, petitioner has failed to demonstrate that the prohibition on newspapers, magazines, and photographs is likely to have any marginal effect on security.

> "[E]ach [LTSU–2] inmate is given a jumpsuit, a blanket, two bedsheets, a pillow case, a roll of toilet paper, a copy of a prison handbook, ten sheets of writing paper, sev-

> eral envelopes, carbon paper, three pairs of socks, three undershorts and three undershirts, and may at any point also have religious newspapers, legal periodicals, a prison library book, Bibles, and a lunch tray with a plate and a cup. Many of these items are flammable, could be used [to start fires, catapult feces, or to create other dangers] as effectively as a newspaper, magazine or photograph, and have been so used by [LTSU–2] inmates." 399 F. 3d 134, 143 (CA3 2005) (case below).

In fact, the amount of potentially dangerous material to which LTSU–2 inmates are seeking access is quite small in comparison to the amount of material that they already possess in their cells. As the Court of Appeals emphasized, LTSU–2 inmates "are not requesting unlimited access to innumerable periodicals," rather, they are seeking "the ability to have *one* newspaper or magazine and some small number of photographs in their cells at one time." *Id.*, at 144 (emphasis added). In light of the quantity of materials that LTSU–2 inmates are entitled to have in their cell, it does not follow, as a matter of logic, that preventing inmates from possessing a single copy of a secular, nonlegal newspaper, newsletter, or magazine will have any measurable effect on the likelihood that inmates will start fires, hide contraband, or engage in other dangerous actions. See, *e. g.*, *Mann* v. *Smith*, 796 F. 2d 79, 81 (CA5 1986) (Higginbotham, J.) (invalidating a county jail's ban on newspapers and magazines because, "[i]n view of the jail's policy of allowing inmates to possess other material that was flammable and capable of being used to interfere with the plumbing," the rule was "too underinclusive" to be constitutional).[1]

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[1] Even less apparent is the security risk that would be posed by respondent's alternative suggestion, which is that LTSU–2 inmates be able to access news periodicals in the LTSU mini-law library, where inmates are already permitted to go to view legal materials during 2-hour blocs of time pursuant to a first-come, first-serve roster of requests. See 399 F. 3d 134, 147 (CA3 2005) (case below).

Moreover, there is no record evidence in this case to support a contrary conclusion. Deputy Superintendent Joel Dickson, whose deposition is a major part of the sparse record before us, did not identify any dangerous behavior that would be more likely to occur if LTSU–2 inmates obtained the limited access to periodicals that they are seeking. He did, however, make clear that inmates could engage in any of the behaviors that worried prison officials without using banned materials:

> "Q. Wouldn't it be fair to say that if an inmate wants to start a fire, he could start a fire using writing paper in combination with a blanket or in combination with clothing or linen, bedding materials? He could do that; couldn't he?
>
> "A. Yes.
>
> "Q. If he wants to throw feces, he could use a cup for that; true?
>
> "A. Yes.
>
> "Q. Or if he wants to throw urine, he can use his cup to throw the urine?
>
> "A. Yes." App. 196–197.[2]

The security-based justification for the ban on personal photographs is even weaker. There is not a single statement in Superintendent Dickson's deposition suggesting that prisoners have used, or would be likely to use, photographic paper to start fires or hurl excrement. Cf. *id.*, at 196 (stating that paper products are generally used to start fires).

Perhaps, at trial, petitioner could introduce additional evidence supporting his view that the challenged regulation is in fact reasonably likely to enhance security or that respond-

[2] See also App. 194 ("I would say there's any number of ways [LTSU–2 inmates hurl feces]. Oftentimes it's with the cups that they're given for their drinks, things like that, any type of container; or . . . a piece of a paper or whatever wrapped up that they can use to give a little leverage and fling the materials").

ent's request for limited access to newspapers and photographs would, for some as yet undisclosed reason, require an unduly burdensome expenditure of resources on the part of prison officials. However, the above discussion makes clear that, at the very least, "reasonable minds could differ as to the import of the evidence" introduced thus far concerning the relationship between the challenged regulation and petitioner's posited security interest, *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 250 (1986). Accordingly, petitioner's valid interest in security is not sufficient to warrant judgment as a matter of law. See *id.*, at 250–251.

The second rationale posited by petitioner in support of the prohibitions on newspapers, newsletters, magazines, and photographs is rehabilitation. According to petitioner, the ban "provides the [l]evel 2 inmates with the prospect of earning a privilege through compliance with orders and remission of various negative behaviors and serves to encourage the progress and discourage backsliding by the level 1 inmates." App. 27. In the plurality's view, in light of the present record, this rationale is sufficient to warrant a reversal of the judgment below.

Rehabilitation is undoubtedly a legitimate penological interest. However, the particular theory of rehabilitation at issue in this case presents a special set of concerns for courts considering whether a prison regulation is consistent with the First Amendment. Specifically, petitioner advances a deprivation theory of rehabilitation: Any deprivation of something a prisoner desires gives him an added incentive to improve his behavior. This justification has no limiting principle; if sufficient, it would provide a "rational basis" for any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the right at some future time by modifying his behavior. See *Kimberlin* v. *United States Dept. of Justice*, 318 F. 3d 228, 240 (CADC 2003) (Tatel, J., concurring in part and dissenting in part) (noting that "regulations that deprive prisoners of their constitutional rights

will *always* be rationally related to the goal of making prison more miserable"). Indeed, the more important the constitutional right at stake (at least from the prisoners' perspective), the stronger the justification for depriving prisoners of that right. The plurality admits as much: "If the Policy (in the authorities' view) helps to produce better behavior, then its absence (in the authorities' view) will help to produce worse behavior . . . ." *Ante*, at 532.

Not surprisingly, as JUSTICE THOMAS recognizes, see *ante*, at 541–542 (opinion concurring in judgment), this deprivation theory does not map easily onto several of the *Turner* factors, which are premised on prison officials presenting a secondary effects type rationale in support of a challenged regulation. For instance, under the deprivation theory of rehabilitation, there could never be a "ready alternative" for furthering the government interest, because the government interest is tied directly to depriving the prisoner of the constitutional right at issue.

Indeed, the strong form of the deprivation theory of rehabilitation would mean that the prison rule we invalidated in *Turner* would have survived constitutional scrutiny if the State had simply posited an interest in rehabilitating prisoners through deprivation. In *Turner*, we held that a Missouri regulation that forbade inmates from marrying except with the permission of the prison superintendent was facially unconstitutional. See 482 U. S., at 97–99. We rejected the State's proffered security and rehabilitation concerns as not reasonably related to the marriage ban. See *ibid.* Taken to its logical conclusion, however, the deprivation theory of rehabilitation would mean that the marriage ban in *Turner* could be justified because the prohibition furnished prisoners with an incentive to behave well and thus earn early release. Cf. *Safley* v. *Turner*, 586 F. Supp. 589, 593 (WD Mo. 1984) (noting that, under the Missouri regulations partially invalidated by *Turner*, 482 U. S. 78, inmates had been threatened with the loss of parole for attempting to exercise their marriage rights).

In sum, rehabilitation is a valid penological interest, and deprivation is undoubtedly one valid tool in promoting rehabilitation. Nonetheless, to ensure that *Turner* continues to impose meaningful limits on the promulgation of rules that infringe upon inmates' constitutional rights, see *Thornburgh* v. *Abbott*, 490 U. S. 401, 414 (1989) (stating that *Turner*'s reasonableness standard "'is not toothless'"), courts must be especially cautious in evaluating the constitutionality of prison regulations that are supposedly justified primarily on that basis. When, as here, a reasonable factfinder could conclude that challenged deprivations have a tenuous logical connection to rehabilitation, or are exaggerated responses to a prison's legitimate interest in rehabilitation, prison officials are not entitled to judgment as a matter of law.

Petitioner argues that, because the various deprivations in the levels of disciplinary confinement short of LTSU–2 are also severe, prison officials have no choice but to deprive inmates of core constitutional rights in LTSU–2 in order to make LTSU–2 more unattractive than other types of segregation. The fact that most States and the Federal Government run their prisons without resorting to the type of ban at issue in this case, see Brief for American Civil Liberties Union et al. as *Amici Curiae* 21,[3] casts serious doubt upon the need for the challenged constitutional deprivations.

In any event, if we consider the severity of the other conditions of confinement in LTSU–2, it becomes obvious that inmates have a powerful motivation to escape those conditions irrespective of the ban on newspapers, magazines, and personal photographs. Inmates in LTSU–2 face 23 hours a day

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[3] This is presumably the type of evidence the plurality suggests that respondent should have presented through an affidavit or deposition in response to petitioner's motion for summary judgment. See *Jacklovich* v. *Simmons*, 392 F. 3d 420, 428–429 (CA10 2004) (noting that plaintiffs challenging a prison regulation that limited access to publications had introduced such evidence and concluding that prison officials were not entitled to summary judgment).

in solitary confinement, are allowed only one visitor per month, may not make phone calls except in cases of emergency, lack any access to radio or television, may not use the prison commissary, are not permitted General Educational Development (GED) or special education study, and may not receive compensation under the inmate compensation system if they work as a unit janitor. Although conditions in LTSU–1 are also harsh, in several respects unrelated to the challenged regulation, they are far more appealing than the conditions in LTSU–2. LTSU–1 inmates may have two visitors and may make one phone call per month; they have access to the commissary; they are permitted in-cell GED or special education study; they are permitted a wider range of counseling services; and they are eligible to obtain compensation under the inmate compensation system. See App. 43, 102; 399 F. 3d, at 148 (case below). The logical conclusion from this is that, even if LTSU–2 prisoners were not deprived of access to newspapers and personal photographs, they would still have a strong incentive to gain promotion to LTSU–1.

In addition, prisoners in LTSU–1 do *not* regain access to personal photographs, which means that the ban on photographs cannot be justified by petitioner's "'hope'" that inmates will respond to the constitutional deprivations in LTSU–2 by improving their behavior so they may graduate into LTSU–1, *id.*, at 142 (quoting petitioner's counsel). Prisoners who "graduate" out of the LTSU–1 and back into the general prison population do regain their right to possess personal photographs, but they also regain so many additional privileges—from ending their solitary confinement to regaining access to television and radio—that it strains credulity to believe that the possibility of regaining the right to possess personal photographs if they eventually return to the general prison population would have any marginal effect on the actions of prisoners in LTSU–2.

In sum, the logical connection between the ban on newspapers and (especially) the ban on personal photographs, on one hand, and the rehabilitation interests posited by petitioner, on the other, is at best highly questionable. Moreover, petitioner did not introduce evidence that his proposed theory of behavior modification has any basis in human psychology, or that the challenged rule has in fact had any rehabilitative effect on LTSU–2 inmates. *Ibid.*[4] Accordingly, at least based on the present state of the record, a reasonable fact-finder could conclude that prisoners would have a sufficiently powerful incentive to graduate out of LTSU–2 even absent the challenged rule, such that the rule is not likely to have any appreciable behavior modification effect.

The temporal character of LTSU–2 status further undermines petitioner's argument that the ban on newspapers and photographs at issue in this case is reasonably related to a legitimate penological interest. All LTSU inmates must spend 90 days in LTSU–2 status. After that, they receive a review every 30 days to determine if they should be promoted to LTSU–1. That determination is made at the discretion of prison administrators, and is not linked to any specific infraction or compliance. Petitioner acknowledges that "[a]n inmate in the LTSU can remain on Level 2 status indefinitely." App. 26. Indeed, as of August 2002, which is the most recent date for which there is record evidence,

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[4] I emphasize the lack of evidentiary support for petitioner's position because I believe that, in light of the record currently before the Court, the logical connection between petitioner's stated interest in rehabilitation and the prohibition on newspapers and photographs is exceedingly tenuous. When the logical connection between prison officials' stated interests and the restrictions on prisoners' constitutional rights is not self-evident, we have considered whether prison officials proffered any evidence that their regulations served the values they identified. See, *e. g.*, *Turner* v. *Safley*, 482 U. S. 78, 98 (1987) (discussing lack of evidence in the record to support a ban on marriage as related to prison officials' stated objectives).

roughly three-quarters of inmates placed in LTSU–2 had remained in that status since the inception of the LTSU program over two years earlier. See *id.*, at 138. See also *ante*, at 532 (plurality opinion). In short, as the Court of Appeals explained:

> "[T]he LTSU Level 2 is a unique kind of segregation with characteristics of both disciplinary and administrative segregation. Inmates come to LTSU because of 'unacceptable behaviors' in other institutions, but they have not all been adjudicated by a hearing officer to have violated the [Department of Corrections'] rules. The LTSU is not a place where inmates are sent for a discrete period of punishment, pursuant to a specific infraction, but is a place for 'Long Term' segregation of the most incorrigible and difficult prisoners for as long as they fall under that umbrella." 399 F. 3d, at 141 (citation omitted).

The indefinite nature of LTSU–2 confinement, and the fact that as of August 2002 a significant majority of inmates confined at LTSU–2 had remained there since the inception of the program over two years earlier, suggest that the prohibition on newspapers, magazines, and personal photographs is an exaggerated response to the prison's legitimate interest in rehabilitation. It would be a different case if prison officials had promulgated a regulation that deprived LTSU–2 inmates of certain First Amendment rights for a short period of time in response to specific disciplinary infractions. The indefinite deprivations at issue here, however, obviously impose a much greater burden on inmates' ability to exercise their constitutional rights. Absent evidence that these indefinite deprivations will be more effective in achieving rehabilitation than shorter periods of deprivation, a reasonable factfinder could conclude that the challenged regulation "sweeps much more broadly than can be explained by [prison

officials'] penological objectives," *Turner*, 482 U. S., at 98, and is hence an exaggerated response to petitioner's legitimate interest in rehabilitation.

In short, as with regard to the current state of the record concerning the connection between the challenged regulation and its effect on prison security, the record is insufficient to conclude, as a matter of law, that petitioner has established a reasonable relationship between his valid interest in inmate rehabilitation and the prohibition on newspapers, magazines, and personal photographs in LTSU–2.

* * *

What is perhaps most troubling about the prison regulation at issue in this case is that the rule comes perilously close to a state-sponsored effort at mind control. The State may not "'invad[e] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" *Wooley* v. *Maynard*, 430 U. S. 705, 715 (1977) (quoting *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943)). In this case, the complete prohibition on secular, nonlegal newspapers, newsletters, and magazines prevents prisoners from "receiv[ing] suitable access to social, political, esthetic, moral, and other ideas," which are central to the development and preservation of individual identity, and are clearly protected by the First Amendment, *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969). Similarly, the ban on personal photographs, for at least some inmates, interferes with the capacity to remember loved ones, which is undoubtedly a core part of a person's "sphere of intellect and spirit." Moreover, it is difficult to imagine a context in which these First Amendment infringements could be more severe; LTSU–2 inmates are in solitary confinement for 23 hours a day with no access to radio or television, are not permitted to make phone calls except in cases of emergency, and may only have one visitor per month. They are essentially isolated from any meaning-

ful contact with the outside world. The severity of the constitutional deprivations at issue in this case should give us serious pause before concluding, as a matter of law, that the challenged regulation is consistent with the sovereign's duty to treat prisoners in accordance with "the ethical tradition that accords respect to the dignity and intrinsic worth of every individual." *Overton* v. *Bazzetta*, 539 U. S. 126, 138 (2003) (STEVENS, J., joined by SOUTER, GINSBURG, and BREYER, JJ., concurring) (internal quotation marks omitted).[5]

Because I believe a full trial is necessary before forming a definitive judgment on whether the challenged regulation is reasonably related to petitioner's valid interests in security and rehabilitation, I respectfully dissent.

JUSTICE GINSBURG, dissenting.

JUSTICE STEVENS comprehensively explains why the justifications advanced by the Secretary of Pennsylvania's Department of Corrections (Secretary) do not warrant pretrial dismissal of Ronald Banks's complaint alleging arbitrary deprivation of access to the news of the day. *Ante*, p. 542. Joining JUSTICE STEVENS' dissenting opinion in full, I direct this separate writing to the plurality's apparent misapprehension of the office of summary judgment.

As the plurality recognizes, *ante*, at 529, there is more to the summary judgment standard than the absence of any genuine issue of material fact; the moving party must also show that he is "entitled to a judgment as a matter of law." Fed. Rule Civ. Proc. 56(c); *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 249–255 (1986); *id.*, at 250–251 (summary judgment is unwarranted "[i]f reasonable minds could differ as to the import of the evidence"). Here, the Secretary cannot

[5] In contrast to this case, the constitutional right at issue in *Overton* involved freedom of association, which, "as our cases have established . . . is among the rights least compatible with incarceration." 539 U. S., at 131 (opinion of the Court).

instantly prevail if, based on the facts so far shown and with due deference to the judgment of prison authorities, a rational trier could conclude that the challenged regulation is not "reasonably related to legitimate penological interests." *Turner* v. *Safley*, 482 U. S. 78, 89 (1987).

The showing made by the Secretary in support of summary judgment is slim, the kind that could be made to justify virtually any prison regulation that does not involve physical abuse. The Secretary relies on his own statement of undisputed facts and the deposition of the prison's Deputy Superintendent. The deposition states that "obviously we are attempting to do the best we can to modify the inmate's behavior so that eventually he can become a more productive citizen . . . . We're very limited . . . in what we can and cannot deny or give to an inmate, and [newspapers and photographs] are some of the items that we feel are legitimate as incentives for inmate growth." App. 189, 190. The Secretary's statement of undisputed facts similarly asserts that the regulation "serves to encourage . . . progress and discourage backsliding." *Id.*, at 27.

These statements, the plurality holds, are sufficient to show that the challenged regulation is reasonably related to inmate rehabilitation. *Ante*, at 531–532. But prison officials "'cannot avoid court scrutiny by reflexive, rote assertions.'" *Shimer* v. *Washington*, 100 F. 3d 506, 510 (CA7 1996) (quoting *Williams* v. *Lane*, 851 F. 2d 867, 886 (CA7 1988) (Flaum, J., concurring in result)). See also *Turner*, 482 U. S., at 98 (noting lack of evidence offered by prison officials to support a ban on inmate marriages); *Murphy* v. *Missouri Dept. of Corrections*, 372 F. 3d 979, 986 (CA8 2004) (applying *Turner* and concluding that the Corrections Department's "documented reason for censoring [a magazine] is too conclusory to support [summary] judgment in its favor"); *Jacklovich* v. *Simmons*, 392 F. 3d 420, 428–434 (CA10 2004). "'[T]raditional deference does not mean that courts [are to]

abdicat[e] their duty to protect those constitutional rights that a prisoner retains.'" 399 F. 3d 134, 140 (CA3 2005) (quoting *Fortner* v. *Thomas*, 983 F. 2d 1024, 1029 (CA11 1993)).

The plurality correctly recognizes that it "must draw 'all justifiable inferences' in Banks'[s] 'favor.'" *Ante*, at 529 (quoting *Liberty Lobby*, 477 U. S., at 255). It then backtracks, distinguishing "evidence of disputed facts" from "disputed matters of professional judgment," and asserts that "[i]n respect to the latter, our inferences must accord deference to the views of prison authorities." *Ante*, at 530. While *Turner* deference can and should be incorporated into the evaluation of a motion for summary judgment, that deference should come into play, pretrial, only after the facts shown are viewed in the light most favorable to the nonmoving party and all inferences are drawn in that party's favor. See *Liberty Lobby*, 477 U. S., at 252–255; cf. *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 150–151 (2000).

As I see it, on the limited record thus far made and without the benefit of trial, "the logical connection between the [no news journals] regulation and the asserted goal" could be found by a reasonable trier to be "so remote as to render the policy arbitrary or irrational." *Turner*, 482 U. S., at 89–90. The regulation denies The Christian Science Monitor to inmates housed in level 2 of the prison's long-term segregation unit but allows them The Jewish Daily Forward, based on the determination of a prison official that the latter qualifies as a religious publication and the former does not. App. 179–180; 399 F. 3d, at 147. Prisoners are allowed to read Harlequin romance novels, but not to learn about the war in Iraq or Hurricane Katrina. The first justification cited by prison officials for impinging on inmates' First Amendment rights in this way is too tenuous to be plausible. See *ante*, at 543–546 (STEVENS, J., dissenting) (discussing security ra-

tionale); 399 F. 3d, at 142–144 (same). The second could be recited, routinely, to immunize all manner of prison regulations from review for rationality. See *ante*, at 546–552 (STEVENS, J., dissenting) (discussing deprivation/"rehabilitation" rationale); 399 F. 3d, at 140–142 (same).

Turner came to us after a full trial, and the Court's opinion in that case relied heavily on testimony elicited at trial in evaluating the reasonableness of the regulations at issue. 482 U. S., at 91–93, 96–99. *Overton* likewise came to this Court on a record made at trial. *Overton* v. *Bazzetta*, 539 U. S. 126, 133 (2003). But in this case, the defender of the regulation invites summary judgment. All inferences are to be drawn in favor of the prisoner opposing the regulation, and the question is not which side has the better argument, but whether the Secretary has shown he is entitled to a judgment *as a matter of law*. By elevating the summary judgment opponent's burden to a height prisoners lacking nimble counsel cannot reach, the plurality effectively tells prison officials they will succeed in cases of this order, and swiftly, while barely trying. It suffices for them to say, in our professional judgment the restriction is warranted. The asserted right to read, see *ante*, at 543 (STEVENS, J., dissenting), is indeed an "important one," see *ante*, at 535 (plurality opinion of BREYER, J.). Even in highest security custody, a constitutional interest of that order merits more than peremptory treatment.

* * *

For the reasons stated by JUSTICE STEVENS and in this opinion, I would affirm the Third Circuit's judgment reversing the award of summary judgment to the Secretary.

Syllabus

HAMDAN *v.* RUMSFELD, SECRETARY OF DEFENSE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05–184. Argued March 28, 2006—Decided June 29, 2006

Pursuant to Congress' Joint Resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the September 11, 2001, al Qaeda terrorist attacks (AUMF), U. S. Armed Forces invaded Afghanistan. During the hostilities, in 2001, militia forces captured petitioner Hamdan, a Yemeni national, and turned him over to the U. S. military, which, in 2002, transported him to prison in Guantanamo Bay, Cuba. Over a year later, the President deemed Hamdan eligible for trial by military commission for then-unspecified crimes. After another year, he was charged with conspiracy "to commit . . . offenses triable by military commission." In habeas and mandamus petitions, Hamdan asserted that the military commission lacks authority to try him because (1) neither congressional Act nor the common law of war supports trial by this commission for conspiracy, an offense that, Hamdan says, is not a violation of the law of war; and (2) the procedures adopted to try him violate basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.

The District Court granted habeas relief and stayed the commission's proceedings, concluding that the President's authority to establish military commissions extends only to offenders or offenses triable by such a commission under the law of war; that such law includes the Third Geneva Convention; that Hamdan is entitled to that Convention's full protections until adjudged, under it, not to be a prisoner of war; and that, whether or not Hamdan is properly classified a prisoner of war, the commission convened to try him was established in violation of both the Uniform Code of Military Justice (UCMJ), 10 U. S. C. §801 *et seq.*, and Common Article 3 of the Third Geneva Convention because it had the power to convict based on evidence the accused would never see or hear. The D. C. Circuit reversed. Although it declined the Government's invitation to abstain from considering Hamdan's challenge, cf. *Schlesinger* v. *Councilman*, 420 U. S. 738, the appeals court ruled, on the merits, that Hamdan was not entitled to relief because the Geneva Conventions are not judicially enforceable. The court also concluded

that *Ex parte Quirin*, 317 U. S. 1, foreclosed any separation-of-powers objection to the military commission's jurisdiction, and that Hamdan's trial before the commission would violate neither the UCMJ nor Armed Forces regulations implementing the Geneva Conventions.

Held: The judgment is reversed, and the case is remanded.

415 F. 3d 33, reversed and remanded.

JUSTICE STEVENS delivered the opinion of the Court, except as to Parts V and VI–D–iv, concluding:

1. The Government's motion to dismiss, based on the Detainee Treatment Act of 2005 (DTA), is denied. DTA § 1005(e)(1) provides that "no court . . . shall have jurisdiction to hear or consider . . . an application for . . . habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay." Section 1005(h)(2) provides that §§ 1005(e)(2) and (3)—which give the D. C. Circuit "exclusive" jurisdiction to review the final decisions of, respectively, combatant status review tribunals and military commissions—"shall apply with respect to any claim whose review is . . . pending on" the DTA's effective date, as was Hamdan's case. The Government's argument that §§ 1005(e)(1) and (h) repeal this Court's jurisdiction to review the decision below is rebutted by ordinary principles of statutory construction. A negative inference may be drawn from Congress' failure to include § 1005(e)(1) within the scope of § 1005(h)(2). Cf., *e. g.*, *Lindh* v. *Murphy*, 521 U. S. 320, 330. "If . . . Congress was reasonably concerned to ensure that [§§ 1005(e)(2) and (3)] be applied to pending cases, it should have been just as concerned about [§ 1005(e)(1)], unless it had the different intent that the latter [section] not be applied to the general run of pending cases." *Id.*, at 329. If anything, the evidence of deliberate omission is stronger here than it was in *Lindh*. The legislative history shows that Congress not only considered the respective temporal reaches of §§ 1005(e)(1), (2), and (3) together at every stage, but omitted paragraph (1) from its directive only after having *rejected* earlier proposed versions of the statute that would have included what is now paragraph (1) within that directive's scope. Congress' rejection of the very language that would have achieved the result the Government urges weighs heavily against the Government's interpretation. See *Doe* v. *Chao*, 540 U. S. 614, 621–623. Pp. 572–584.

2. The Government argues unpersuasively that abstention is appropriate under *Councilman*, which concluded that, as a matter of comity, federal courts should normally abstain from intervening in pending courts-martial against service members, see 420 U. S., at 740. Neither of the comity considerations *Councilman* identified weighs in favor of abstention here. First, the assertion that military discipline and, there-

fore, the Armed Forces' efficient operation, are best served if the military justice system acts without regular interference from civilian courts, see *id.*, at 752, is inapt because Hamdan is not a service member. Second, the view that federal courts should respect the balance Congress struck when it created "an integrated system of military courts and review procedures" is inapposite, since the tribunal convened to try Hamdan is not part of that integrated system. Rather than *Councilman*, the most relevant precedent is *Ex parte Quirin*, where the Court, far from abstaining pending the conclusion of ongoing military proceedings, expedited its review because of (1) the public importance of the questions raised, (2) the Court's duty, in both peace and war, to preserve the constitutional safeguards of civil liberty, and (3) the public interest in a decision on those questions without delay, 317 U. S., at 19. The Government has identified no countervailing interest that would permit federal courts to depart from their general duty to exercise the jurisdiction Congress has conferred on them. Pp. 584–590.

3. The military commission at issue is not expressly authorized by any congressional Act. *Quirin* held that Congress had, through Article of War 15, sanctioned the use of military commissions to try offenders or offenses against the law of war. 317 U. S., at 28. UCMJ Art. 21, which is substantially identical to the old Art. 15, reads: "The jurisdiction [of] courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such . . . commissions." 10 U. S. C. § 821. Contrary to the Government's assertion, even *Quirin* did not view that authorization as a sweeping mandate for the President to invoke military commissions whenever he deems them necessary. Rather, *Quirin* recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President already had to convene military commissions—with the express condition that he and those under his command comply with the law of war. See 317 U. S., at 28–29. Neither the AUMF nor the DTA can be read to provide specific, overriding authorization for the commission convened to try Hamdan. Assuming the AUMF activated the President's war powers, see *Hamdi* v. *Rumsfeld*, 542 U. S. 507, and that those powers include authority to convene military commissions in appropriate circumstances, see, *e. g.*, *id.*, at 518, there is nothing in the AUMF's text or legislative history even hinting that Congress intended to expand or alter the authorization set forth in UCMJ Art. 21. Cf. *Ex parte Yerger*, 8 Wall. 85, 105. Likewise, the DTA cannot be read to authorize this commission. Although the DTA, unlike either Art. 21 or the AUMF, was enacted after the President convened Hamdan's

commission, it contains no language authorizing that tribunal or any other at Guantanamo Bay. Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the Constitution and laws, including the law of war. Absent a more specific congressional authorization, this Court's task is, as it was in *Quirin*, to decide whether Hamdan's military commission is so justified. Pp. 590–595.

4. The military commission at issue lacks the power to proceed because its structure and procedures violate both the UCMJ and the four Geneva Conventions signed in 1949. Pp. 613–635.

(a) The commission's procedures, set forth in Commission Order No. 1, provide, among other things, that an accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding the official who appointed the commission or the presiding officer decides to "close." Grounds for closure include the protection of classified information, the physical safety of participants and witnesses, the protection of intelligence and law enforcement sources, methods, or activities, and "other national security interests." Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to the client what took place therein. Another striking feature is that the rules governing Hamdan's commission permit the admission of *any* evidence that, in the presiding officer's opinion, would have probative value to a reasonable person. Moreover, the accused and his civilian counsel may be denied access to classified and other "protected information," so long as the presiding officer concludes that the evidence is "probative" and that its admission without the accused's knowledge would not result in the denial of a full and fair trial. Pp. 613–615.

(b) The Government objects to this Court's consideration of a procedural challenge at this stage on the grounds, *inter alia*, that Hamdan will be able to raise such a challenge following a final decision under the DTA, and that there is no basis to presume, before the trial has even commenced, that it will not be conducted in good faith and according to law. These contentions are unsound. First, because Hamdan apparently is not subject to the death penalty (at least as matters now stand) and may receive a prison sentence shorter than 10 years, he has no automatic right to federal-court review of the commission's "final decision" under DTA § 1005(e)(3). Second, there *is* a basis to presume that the procedures employed during Hamdan's trial will violate the law: He will be, and *indeed already has been*, excluded from his own trial.

Thus, review of the procedures in advance of a "final decision" is appropriate. Pp. 615–616.

(c) Because UCMJ Article 36 has not been complied with here, the rules specified for Hamdan's commission trial are illegal. The procedures governing such trials historically have been the same as those governing courts-martial. Although this uniformity principle is not inflexible and does not preclude all departures from court-martial procedures, any such departure must be tailored to the exigency that necessitates it. That understanding is reflected in Art. 36(b), which provides that the procedural rules the President promulgates for courts-martial and military commissions alike must be "uniform insofar as practicable," 10 U. S. C. §836(b). The "practicability" determination the President has made is insufficient to justify variances from the procedures governing courts-martial. The President here has determined, pursuant to the requirement of *Art. 36(a)*, that it is impracticable to apply the rules and principles of law that govern "the trial of criminal cases in the United States district courts" to Hamdan's commission. The President has not, however, made a similar official determination that it is impracticable to apply the rules for courts-martial. And even if subsection (b)'s requirements could be satisfied without an official practicability determination, that subsection's requirements are not satisfied here. Nothing in the record demonstrates that it would be impracticable to apply court-martial rules here. There is no suggestion, *e. g.*, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. It is not evident why the danger posed by international terrorism, considerable though it is, should require, in the case of Hamdan's trial, any variance from the court-martial rules. The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: The right to be present. See 10 U. S. C. §839(c). Because the jettisoning of so basic a right cannot lightly be excused as "practicable," the court-martial rules must apply. Since it is undisputed that Commission Order No. 1 deviates in many significant respects from those rules, it necessarily violates Art. 36(b). Pp. 617–625.

(d) The procedures adopted to try Hamdan also violate the Geneva Conventions. The D. C. Circuit dismissed Hamdan's challenge in this regard on the grounds, *inter alia*, that the Conventions are not judicially enforceable and that, in any event, Hamdan is not entitled to their protections. Neither of these grounds is persuasive. Pp. 625–631.

Syllabus

(i) The appeals court relied on a statement in *Johnson* v. *Eisentrager*, 339 U. S. 763, 789, n. 14, suggesting that this Court lacked power even to consider the merits of a Convention argument because the political and military authorities had sole responsibility for observing and enforcing prisoners' rights under the Convention. However, *Eisentrager* does not control here because, regardless of the nature of the rights conferred on Hamdan, cf. *United States* v. *Rauscher*, 119 U. S. 407, they are indisputably part of the law of war, see *Hamdi*, 542 U. S., at 520–521, compliance with which is the condition upon which UCMJ Art. 21 authority is granted. Pp. 626–628.

(ii) Alternatively, the appeals court agreed with the Government that the Conventions do not apply because Hamdan was captured during the war with al Qaeda, which is not a Convention signatory, and that conflict is distinct from the war with signatory Afghanistan. The Court need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not between signatories. Common Article 3, which appears in all four Conventions, provides that, in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties [*i. e.*, signatories], each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons . . . placed *hors de combat* by . . . detention," including a prohibition on "the passing of sentences . . . without previous judgment . . . by a regularly constituted court affording all the judicial guarantees . . . recognized as indispensable by civilized peoples." The D. C. Circuit ruled Common Article 3 inapplicable to Hamdan because the conflict with al Qaeda is international in scope and thus not a "conflict not of an international character." That reasoning is erroneous. That the quoted phrase bears its literal meaning and is used here in contradistinction to a conflict between nations is demonstrated by Common Article 2, which limits its own application to any armed conflict between signatories and provides that signatories must abide by all terms of the Conventions even if another party to the conflict is a nonsignatory, so long as the nonsignatory "accepts and applies" those terms. Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict does not involve a clash between nations (whether signatories or not). Pp. 628–631.

(iii) While Common Article 3 does not define its "regularly constituted court" phrase, other sources define the words to mean an "ordinary military cour[t]" that is "established and organized in accordance

with the laws and procedures already in force in a country." The regular military courts in our system are the courts-martial established by congressional statute. At a minimum, a military commission can be "regularly constituted" only if some practical need explains deviations from court-martial practice. No such need has been demonstrated here. Pp. 631–633.

(iv) Common Article 3's requirements are general, crafted to accommodate a wide variety of legal systems, but they are *requirements* nonetheless. The commission convened to try Hamdan does not meet those requirements. P. 635.

(e) Even assuming that Hamden is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment. P. 635.

JUSTICE STEVENS, joined by JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER, concluded in Parts V and VI–D–iv:

1. The Government has not charged Hamdan with an "offens[e] . . . that . . . by the law of war may be tried by military commissio[n]," 10 U. S. C. §821. Of the three sorts of military commissions used historically, the law-of-war type used in *Quirin* and other cases is the only model available to try Hamdan. Among the preconditions, incorporated in Article of War 15 and, later, UCMJ Art. 21, for such a tribunal's exercise of jurisdiction are, *inter alia*, that it must be limited to trying offenses committed within the convening commander's field of command, *i. e.*, within the theater of war, and that the offense charged must have been committed during, not before or after, the war. Here, Hamdan is not alleged to have committed any overt act in a theater of war or on any specified date after September 11, 2001. More importantly, the offense alleged is not triable by law-of-war military commission. Although the common law of war may render triable by military commission certain offenses not defined by statute, *Quirin*, 317 U. S., at 30, the precedent for doing so with respect to a particular offense must be plain and unambiguous, cf., *e. g.*, *Loving* v. *United States*, 517 U. S. 748, 771. That burden is far from satisfied here. The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war. Moreover, that conspiracy is not a recognized violation of the law of war is confirmed by other international sources, including, *e. g.*, the International Military Tribunal at Nuremberg, which pointedly refused to recognize conspiracy to commit war crimes as such a violation. Because the conspiracy charge

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does not support the commission's jurisdiction, the commission lacks authority to try Hamdan. Pp. 595–613.

2. The phrase "all the judicial guarantees . . . recognized as indispensable by civilized peoples" in Common Article 3 of the Geneva Conventions is not defined, but it must be understood to incorporate at least the barest of the trial protections recognized by customary international law. The procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by practical need, and thus fail to afford the requisite guarantees. Moreover, various provisions of Commission Order No. 1 dispense with the principles, which are indisputably part of customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him. Pp. 633–635.

JUSTICE KENNEDY, agreeing that Hamdan's military commission is unauthorized under the Uniform Code of Military Justice, 10 U. S. C. §§836 and 821, and the Geneva Conventions, concluded that there is therefore no need to decide whether Common Article 3 of the Conventions requires that the accused have the right to be present at all stages of a criminal trial or to address the validity of the conspiracy charge against Hamdan. Pp. 653–655.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I through IV, VI through VI–D–iii, VI–D–v, and VII, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts V and VI–D–iv, in which SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, in which KENNEDY, SOUTER, and GINSBURG, JJ., joined, *post*, p. 636. KENNEDY, J., filed an opinion concurring in part, in which SOUTER, GINSBURG, and BREYER, JJ., joined as to Parts I and II, *post*, p. 636. SCALIA, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined, *post*, p. 655. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which ALITO, J., joined as to all but Parts I, II–C–1, and III–B–2, *post*, p. 678. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined as to Parts I through III, *post*, p. 725. ROBERTS, C. J., took no part in the consideration or decision of the case.

Neal Katyal argued the cause for petitioner. With him on the briefs were *Harry H. Schneider, Jr.*, *Joseph M. McMillan*, *Charles C. Sipos*, *Charles Swift*, *Thomas C. Goldstein*, *Amy Howe*, and *Kevin K. Russell.*

Solicitor General Clement argued the cause for respondents. With him on the brief were *Assistant Attorney Gen-*

Counsel

eral Keisler, Deputy Solicitor General Garre, Deputy Assistant Attorney General Katsas, Jonathan L. Marcus, Kannon K. Shanmugam, Douglas N. Letter, and *Robert M. Loeb.**

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union by *Steven R. Shapiro, Ben Wizner,* and *Lee Gelernt;* for the American Jewish Committee et al. by *Marvin L. Gray, Jr., Jeffrey L. Fisher, Jeffrey P. Sinensky, Kara H. Stein, John W. Whitehead, Elliot M. Mincberg, Arthur H. Bryant,* and *Victoria W. Ni;* for the Association of the Bar of the City of New York et al. by *James J. Benjamin, Jr.,* and *Steven M. Pesner;* for the Brennan Center for Justice et al. by *Sidney S. Rosdeitcher* and *Jonathan Hafetz;* for the Cato Institute by *Timothy Lynch;* for the Center for Constitutional Rights et al. by *Barbara J. Olshansky* and *William H. Goodman;* for International Law Professors by *Linda A. Malone* and *Jordan J. Paust;* for Law Professors by *Claudia Callaway;* for Military Law Historians, Scholars, and Practitioners by *Teresa Wynn Roseborough, Charles Lester, Jr., John A. Chandler,* and *Elizabeth V. Tanis;* for the National Association of Criminal Defense Lawyers by *Donald G. Rehkopf, Jr.;* for the National Institute of Military Justice et al. by *Eugene R. Fidell, Stephen A. Saltzburg, Kathleen A. Duignan,* and *Diane Marie Amann;* for Specialists in Conspiracy and International Law by *George P. Fletcher, pro se;* for the Yemeni National Organization for Defending Rights and Freedoms by *Lawrence D. Rosenberg;* for Madeleine K. Albright et al. by *Harold Hongju Koh* and *Jonathan M. Freiman;* for David Brahms et al. by *Andrew J. Pincus, Jay C. Johnson,* and *Andrew Tauber;* for Norman Dorsen et al. by *Burt Neuborne;* for Louise Doswald-Beck et al. by *Bridget Arimond, David J. Scheffer,* and *Steven A. Kaufman;* for Richard A. Epstein et al. by *Aaron M. Panner, Joseph S. Hall,* and *Mr. Epstein, pro se;* for Louis Fisher by *Lawrence S. Lustberg;* for Ibrahim Ahmed Mahmoud al Qosi by *Paul S. Reichler* and *Sharon A. Shaffer;* for Binyam Mohamed by *Clive A. Stafford Smith* and *Joseph Margulies;* and for Jack N. Rakove et al. by *Pamela S. Karlan.*

Briefs of *amici curiae* urging affirmance were filed for the American Center for Law and Justice et al. by *Jay Alan Sekulow, Stuart J. Roth, James M. Henderson, Sr., Colby M. May,* and *Robert W. Ash;* for Common Defence by *Daniel P. Collins;* for Former Attorneys General of the United States et al. by *Andrew G. McBride* and *Kathryn Comerford Todd;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* were filed for the Human Rights Committee of the Bar of England and Wales et al. by *Stephen J. Pollak* and *John Townsend Rich;* for the Center for National Security Studies et al. by

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I through IV, Parts VI through VI–D–iii, Part VI–D–v, and Part VII, and an opinion with respect to Parts V and VI–D–iv, in which JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join.

Petitioner Salim Ahmed Hamdan, a Yemeni national, is in custody at an American prison in Guantanamo Bay, Cuba. In November 2001, during hostilities between the United States and the Taliban (which then governed Afghanistan), Hamdan was captured by militia forces and turned over to the U. S. military. In June 2002, he was transported to Guantanamo Bay. Over a year later, the President deemed him eligible for trial by military commission for then-unspecified crimes. After another year had passed, Hamdan was charged with one count of conspiracy "to commit . . . offenses triable by military commission." App. to Pet. for Cert. 65a.

John Payton, Seth P. Waxman, Paul R. Q. Wolfson, Kate Martin, and *Joseph Onek;* for Certain Former Federal Judges by *Paul C. Saunders;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* for Human Rights First et al. by *Robert P. LoBue* and *Deborah Pearlstein;* for Legal Scholars and Historians by *Daniel C. Tepstein;* for the Office of Chief Defense Counsel, Office of Military Commissions, by *Dwight H. Sullivan* and *Michael D. Mori;* for Retired Generals and Admirals et al. by *David H. Remes;* for the Urban Morgan Institute for Human Rights by *Christopher J. Wright* and *Timothy J. Simeone;* for Lawrence M. Friedman et al. by *William F. Alderman;* for Ryan Goodman et al. by *Mark A. Packman;* for Senator Lindsey Graham et al. by *Jeffrey A. Lamken;* for Louis Henkin et al. by *Carlos M. Vázquez, pro se;* for David Hicks by *Joshua L. Dratel, Mr. Mori, Marc A. Goldman,* and *Michael B. DeSanctis;* for Arthur R. Miller by *Mr. Remes;* for Richard D. Rosen et al. by *Steven H. Goldblatt;* for More Than 300 Detainees Incarcerated at U. S. Naval Station, Guantanamo Bay, Cuba, et al. by *Thomas B. Wilner, Neil H. Koslowe,* and *Kristine A. Huskey;* and for 422 Current and Former Members of the United Kingdom and European Union Parliaments by *Claude B. Stansbury.*

Hamdan filed petitions for writs of habeas corpus and mandamus to challenge the Executive Branch's intended means of prosecuting this charge. He concedes that a court-martial constituted in accordance with the Uniform Code of Military Justice (UCMJ), 10 U. S. C. § 801 *et seq.* (2000 ed. and Supp. III), would have authority to try him. His objection is that the military commission the President has convened lacks such authority, for two principal reasons: First, neither congressional Act nor the common law of war supports trial by this commission for the crime of conspiracy—an offense that, Hamdan says, is not a violation of the law of war. Second, Hamdan contends, the procedures that the President has adopted to try him violate the most basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.

The District Court granted Hamdan's request for a writ of habeas corpus. 344 F. Supp. 2d 152 (DC 2004). The Court of Appeals for the District of Columbia Circuit reversed. 415 F. 3d 33 (2005). Recognizing, as we did over a half century ago, that trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure, *Ex parte Quirin*, 317 U. S. 1, 19 (1942), we granted certiorari. 546 U. S. 1002 (2005).

For the reasons that follow, we conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions. Four of us also conclude, see Part V, *infra*, that the offense with which Hamdan has been charged is not an "offens[e] that by . . . the law of war may be tried by military commissions." 10 U. S. C. § 821.

I

On September 11, 2001, agents of the al Qaeda terrorist organization hijacked commercial airplanes and attacked the

World Trade Center in New York City and the national headquarters of the Department of Defense in Arlington, Virginia. Americans will never forget the devastation wrought by these acts. Nearly 3,000 civilians were killed.

Congress responded by adopting a Joint Resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF), 115 Stat. 224, note following 50 U. S. C. § 1541 (2000 ed., Supp. III). Acting pursuant to the AUMF, and having determined that the Taliban regime had supported al Qaeda, the President ordered the Armed Forces of the United States to invade Afghanistan. In the ensuing hostilities, hundreds of individuals, Hamdan among them, were captured and eventually detained at Guantanamo Bay.

On November 13, 2001, while the United States was still engaged in active combat with the Taliban, the President issued a comprehensive military order intended to govern the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57833 (hereinafter November 13 Order or Order). Those subject to the November 13 Order include any noncitizen for whom the President determines "there is reason to believe" that he or she (1) "is or was" a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States. *Id.*, at 57834. Any such individual "shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death." *Ibid.* The No-

vember 13 Order vested in the Secretary of Defense the power to appoint military commissions to try individuals subject to the Order, but that power has since been delegated to John D. Altenburg, Jr., a retired Army major general and longtime military lawyer who has been designated "Appointing Authority for Military Commissions."

On July 3, 2003, the President announced his determination that Hamdan and five other detainees at Guantanamo Bay were subject to the November 13 Order and thus triable by military commission. In December 2003, military counsel was appointed to represent Hamdan. Two months later, counsel filed demands for charges and for a speedy trial pursuant to Article 10 of the UCMJ, 10 U. S. C. § 810. On February 23, 2004, the legal adviser to the Appointing Authority denied the applications, ruling that Hamdan was not entitled to any of the protections of the UCMJ. Not until July 13, 2004, after Hamdan had commenced this action in the United States District Court for the Western District of Washington, did the Government finally charge him with the offense for which, a year earlier, he had been deemed eligible for trial by military commission.

The charging document, which is unsigned, contains 13 numbered paragraphs. The first two paragraphs recite the asserted bases for the military commission's jurisdiction—namely, the November 13 Order and the President's July 3, 2003, declaration that Hamdan is eligible for trial by military commission. The next nine paragraphs, collectively entitled "General Allegations," describe al Qaeda's activities from its inception in 1989 through 2001 and identify Usama bin Laden as the group's leader. Hamdan is not mentioned in these paragraphs.

Only the final two paragraphs, entitled "Charge: Conspiracy," contain allegations against Hamdan. Paragraph 12 charges that "from on or about February 1996 to on or about November 24, 2001," Hamdan "willfully and knowingly

joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of al Qaeda] to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism." App. to Pet. for Cert. 65a. There is no allegation that Hamdan had any command responsibilities, played a leadership role, or participated in the planning of any activity.

Paragraph 13 lists four "overt acts" that Hamdan is alleged to have committed sometime between 1996 and November 2001 in furtherance of the "enterprise and conspiracy": (1) he acted as Usama bin Laden's "bodyguard and personal driver," "believ[ing]" all the while that bin Laden "and his associates were involved in" terrorist acts prior to and including the attacks of September 11, 2001; (2) he arranged for transportation of, and actually transported, weapons used by al Qaeda members and by bin Laden's bodyguards (Hamdan among them); (3) he "drove or accompanied [U]sama bin Laden to various al Qaida-sponsored training camps, press conferences, or lectures," at which bin Laden encouraged attacks against Americans; and (4) he received weapons training at al Qaeda-sponsored camps. *Id.*, at 65a–67a.

After this formal charge was filed, the United States District Court for the Western District of Washington transferred Hamdan's habeas and mandamus petitions to the United States District Court for the District of Columbia. Meanwhile, a Combatant Status Review Tribunal (CSRT) convened pursuant to a military order issued on July 7, 2004, decided that Hamdan's continued detention at Guantanamo Bay was warranted because he was an "enemy combatant."[1]

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[1] An "enemy combatant" is defined by the military order as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." Memorandum from Deputy Secretary of Defense Paul Wolfowitz re: Order Establishing Combatant Status Review Tribunal

Separately, proceedings before the military commission commenced.

On November 8, 2004, however, the District Court granted Hamdan's petition for habeas corpus and stayed the commission's proceedings. It concluded that the President's authority to establish military commissions extends only to "offenders or offenses triable by military [commission] under the law of war," 344 F. Supp. 2d, at 158; that the law of war includes the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, T. I. A. S. No. 3364 (Third Geneva Convention); that Hamdan is entitled to the full protections of the Third Geneva Convention until adjudged, in compliance with that treaty, not to be a prisoner of war; and that, whether or not Hamdan is properly classified as a prisoner of war, the military commission convened to try him was established in violation of both the UCMJ and Common Article 3 of the Third Geneva Convention because it had the power to convict based on evidence the accused would never see or hear. 344 F. Supp. 2d, at 158–172.

The Court of Appeals for the District of Columbia Circuit reversed. Like the District Court, the Court of Appeals declined the Government's invitation to abstain from considering Hamdan's challenge. Cf. *Schlesinger* v. *Councilman*, 420 U. S. 738 (1975). On the merits, the panel rejected the District Court's further conclusion that Hamdan was entitled to relief under the Third Geneva Convention. All three judges agreed that the Geneva Conventions were not "judicially enforceable," 415 F. 3d, at 38, and two thought that the Conventions did not in any event apply to Hamdan, *id.*, at 40–42; but see *id.*, at 44 (Williams, J., concurring). In other portions of its opinion, the court concluded that our decision in *Quirin* foreclosed any separation-of-powers objection to

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§ *a* (July 7, 2004), available at http://www.defenselink.mil/news/Jul2004/d20040707review.pdf (all Internet materials as visited June 26, 2006, and available in Clerk of Court's case file).

the military commission's jurisdiction, and held that Hamdan's trial before the contemplated commission would violate neither the UCMJ nor U. S. Armed Forces regulations intended to implement the Geneva Conventions. 415 F. 3d, at 38, 42–43.

On November 7, 2005, we granted certiorari to decide whether the military commission convened to try Hamdan has authority to do so, and whether Hamdan may rely on the Geneva Conventions in these proceedings.

II

On February 13, 2006, the Government filed a motion to dismiss the writ of certiorari. The ground cited for dismissal was the recently enacted Detainee Treatment Act of 2005 (DTA), Pub. L. 109–148, 119 Stat. 2739. We postponed our ruling on that motion pending argument on the merits, 546 U. S. 1166 (2006), and now deny it.

The DTA, which was signed into law on December 30, 2005, addresses a broad swath of subjects related to detainees. It places restrictions on the treatment and interrogation of detainees in U. S. custody, and it furnishes procedural protections for U. S. personnel accused of engaging in improper interrogation. DTA §§ 1002–1004, 119 Stat. 2739–2740. It also sets forth certain "PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES." § 1005, *id.*, at 2740. Subsections (a) through (d) of § 1005 direct the Secretary of Defense to report to Congress the procedures being used by CSRTs to determine the proper classification of detainees held in Guantanamo Bay, Iraq, and Afghanistan, and to adopt certain safeguards as part of those procedures.

Subsection (e) of § 1005, which is entitled "JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS," supplies the basis for the Government's jurisdictional argument. The subsection contains three numbered paragraphs. The first paragraph amends the judicial code as follows:

"(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"'(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

"'(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

"'(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

"'(A) is currently in military custody; or

"'(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.'" § 1005(e), *id.*, at 2741–2742.

Paragraph (2) of subsection (e) vests in the Court of Appeals for the District of Columbia Circuit the "exclusive jurisdiction to determine the validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant." Paragraph (2) also delimits the scope of that review. See §§ 1005(e)(2)(C)(i)–(ii), *id.*, at 2742.

Paragraph (3) mirrors paragraph (2) in structure, but governs judicial review of final decisions of military commissions, not CSRTs. It vests in the Court of Appeals for the District of Columbia Circuit "exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order)." § 1005(e)(3)(A), *id.*, at 2743.[2]

[2]The military order referenced in this section is discussed further in Parts III and VI, *infra*.

Review is as of right for any alien sentenced to death or a term of imprisonment of 10 years or more, but is at the Court of Appeals' discretion in all other cases. The scope of review is limited to the following inquiries:

> "(i) whether the final decision [of the military commission] was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and
>
> "(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States." § 1005(e)(3)(D), *ibid.*

Finally, § 1005 contains an "effective date" provision, which reads as follows:

> "(1) IN GENERAL.—This section shall take effect on the date of the enactment of this Act.
>
> "(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS.—Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act." § 1005(h), *id.*, at 2743–2744.[3]

The DTA is silent about whether paragraph (1) of subsection (e) "shall apply" to claims pending on the date of enactment.

The Government argues that §§ 1005(e)(1) and 1005(h) had the immediate effect, upon enactment, of repealing federal jurisdiction not just over detainee habeas actions yet to be filed but also over any such actions then pending in any federal court—including this Court. Accordingly, it argues, we

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[3] The penultimate subsections of § 1005 emphasize that the provision does not "confer any constitutional right on an alien detained as an enemy combatant outside the United States" and that the "United States" does not, for purposes of § 1005, include Guantanamo Bay. §§ 1005(f)–(g).

lack jurisdiction to review the Court of Appeals' decision below.

Hamdan objects to this theory on both constitutional and statutory grounds. Principal among his constitutional arguments is that the Government's preferred reading raises grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction, particularly in habeas cases. Support for this argument is drawn from *Ex parte Yerger*, 8 Wall. 85 (1869), in which, having explained that "the denial to this court of appellate jurisdiction" to consider an original writ of habeas corpus would "greatly weaken the efficacy of the writ," *id.*, at 102–103, we held that Congress would not be presumed to have effected such denial absent an unmistakably clear statement to the contrary. See *id.*, at 104–105; see also *Felker* v. *Turpin*, 518 U. S. 651 (1996); *Durousseau* v. *United States*, 6 Cranch 307, 314 (1810) (opinion for the Court by Marshall, C. J.) (The "appellate powers of this court" are not created by statute but are "given by the constitution"); *United States* v. *Klein*, 13 Wall. 128 (1872). Cf. *Ex parte McCardle*, 7 Wall. 506, 514 (1869) (holding that Congress had validly foreclosed one avenue of appellate review where its repeal of habeas jurisdiction, reproduced in the margin,[4] could not have been "a plainer instance of positive exception"). Hamdan also suggests that, if the Government's reading is correct, Congress has unconstitutionally suspended the writ of habeas corpus.

We find it unnecessary to reach either of these arguments. Ordinary principles of statutory construction suffice to rebut

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[4] "'*And be it further enacted*, That so much of the act approved February 5, 1867, entitled "An act to amend an act to establish the judicial courts of the United States, approved September 24, 1789," as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court, on appeals which have been, or may hereafter be taken, be, and the same is hereby repealed.'" 7 Wall., at 508.

the Government's theory—at least insofar as this case, which was pending at the time the DTA was enacted, is concerned.

The Government acknowledges that only paragraphs (2) and (3) of subsection (e) are expressly made applicable to pending cases, see § 1005(h)(2), 119 Stat. 2743–2744, but argues that the omission of paragraph (1) from the scope of that express statement is of no moment. This is so, we are told, because Congress' failure to expressly reserve federal courts' jurisdiction over pending cases erects a presumption against jurisdiction, and that presumption is rebutted by neither the text nor the legislative history of the DTA.

The first part of this argument is not entirely without support in our precedents. We have in the past "applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf* v. *USI Film Products*, 511 U. S. 244, 274 (1994) (citing *Bruner* v. *United States*, 343 U. S. 112 (1952); *Hallowell* v. *Commons*, 239 U. S. 506 (1916)); see *Republic of Austria* v. *Altmann*, 541 U. S. 677, 693 (2004). But the "presumption" that these cases have applied is more accurately viewed as the nonapplication of another presumption—viz., the presumption against retroactivity—in certain limited circumstances.[5] If a statutory provision "would operate retroactively" as applied to cases pending at the time the provision was enacted, then "our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Landgraf*, 511 U. S., at 280. We have explained, however, that, unlike other intervening changes in the law, a

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[5] See *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939, 951 (1997) ("The fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity . . . ").

jurisdiction-conferring or jurisdiction-stripping statute usually "takes away no substantive right but simply changes the tribunal that is to hear the case." *Hallowell*, 239 U. S., at 508. If that is truly all the statute does, no retroactivity problem arises because the change in the law does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U. S., at 280.[6] And if a new rule has no retroactive effect, the presumption against retroactivity will not prevent its application to a case that was already pending when the new rule was enacted.

That does not mean, however, that all jurisdiction-stripping provisions—or even all such provisions that truly lack retroactive effect—must apply to cases pending at the time of their enactment.[7] "[N]ormal rules of construction," including a contextual reading of the statutory language, may dictate otherwise. *Lindh* v. *Murphy*, 521 U. S. 320, 326

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[6] Cf. *ibid.* ("Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties" (emphasis in original)).

[7] In his insistence to the contrary, JUSTICE SCALIA reads too much into *Bruner* v. *United States*, 343 U. S. 112 (1952), *Hallowell* v. *Commons*, 239 U. S. 506 (1916), and *Insurance Co.* v. *Ritchie*, 5 Wall. 541 (1867). See *post*, at 656–658 (dissenting opinion). None of those cases says that the absence of an express provision reserving jurisdiction over pending cases trumps or renders irrelevant any other indications of congressional intent. Indeed, *Bruner* itself relied on such other indications—including a negative inference drawn from the statutory text, cf. *infra*, at 578—to support its conclusion that jurisdiction was not available. The Court observed that (1) Congress had been put on notice by prior lower court cases addressing the Tucker Act that it ought to specifically reserve jurisdiction over pending cases, see 343 U. S., at 115, and (2) in contrast to the congressional silence concerning reservation of jurisdiction, reservation *had* been made of "'any rights or liabilities' existing at the effective date of the Act" repealed by another provision of the Act, *ibid.*, n. 7.

(1997).[8] A familiar principle of statutory construction, relevant both in *Lindh* and here, is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute. See *id.*, at 330; see also, *e. g.*, *Russello* v. *United States*, 464 U. S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'"). The Court in *Lindh* relied on this reasoning to conclude that certain limitations on the availability of habeas relief imposed by AEDPA applied only to cases filed after that statute's effective date. Congress' failure to identify the temporal reach of those limitations, which governed noncapital cases, stood in contrast to its express command in the same legislation that new rules governing habeas petitions in capital cases "apply to cases pending on or after the date of enactment." § 107(c), 110 Stat. 1226; see *Lindh*, 521 U. S., at 329–330. That contrast, combined with the fact that the amendments at issue "affect[ed] substantive entitlement to relief," *id.*, at 327, warranted drawing a negative inference.

A like inference follows *a fortiori* from *Lindh* in this case. "If . . . Congress was reasonably concerned to ensure that [§§ 1005(e)(2) and (3)] be applied to pending cases, it should have been just as concerned about [§ 1005(e)(1)], unless it had the different intent that the latter [section] not be applied to the general run of pending cases." *Id.*, at 329. If anything, the evidence of deliberate omission is stronger here than it

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[8] The question in *Lindh* was whether new limitations on the availability of habeas relief imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, applied to habeas actions pending on the date of AEDPA's enactment. We held that they did not. At the outset, we rejected the State's argument that, in the absence of a clear congressional statement to the contrary, a "procedural" rule must apply to pending cases. 521 U. S., at 326.

was in *Lindh*. In *Lindh*, the provisions to be contrasted had been drafted separately but were later "joined together and . . . considered simultaneously when the language raising the implication was inserted." *Id.*, at 330. We observed that Congress' tandem review and approval of the two sets of provisions strengthened the presumption that the relevant omission was deliberate. *Id.*, at 331; see also *Field* v. *Mans*, 516 U. S. 59, 75 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects"). Here, Congress not only considered the respective temporal reaches of paragraphs (1), (2), and (3) of subsection (e) together at every stage, but omitted paragraph (1) from its directive that paragraphs (2) and (3) apply to pending cases only after having *rejected* earlier proposed versions of the statute that would have included what is now paragraph (1) within the scope of that directive. Compare DTA § 1005(h)(2), 119 Stat. 2743–2744, with 151 Cong. Rec. S12655 (Nov. 10, 2005) (S. Amdt. 2515); see *id.*, at S14257–S14258 (Dec. 21, 2005) (discussing similar language proposed in both the House and the Senate).[9] Congress' rejection of the very language that would have

[9] That paragraph (1), along with paragraphs (2) and (3), is to "take effect on the date of the enactment," DTA § 1005(h)(1), 119 Stat. 2743, is not dispositive; "a 'statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.'" *INS* v. *St. Cyr*, 533 U. S. 289, 317 (2001) (quoting *Landgraf* v. *USI Film Products*, 511 U. S. 244, 257 (1994)). Certainly, the "effective date" provision cannot bear the weight JUSTICE SCALIA would place on it. See *post*, at 659, and n. 1. Congress deemed that provision insufficient, standing alone, to render subsections (e)(2) and (e)(3) applicable to pending cases; hence its adoption of subsection (h)(2). JUSTICE SCALIA seeks to avoid reducing subsection (h)(2) to a mere redundancy—a consequence he seems to acknowledge must otherwise follow from his interpretation—by speculating that Congress had special reasons, not also relevant to subsection (e)(1), to worry that subsections (e)(2) and (e)(3) would be ruled inapplicable to pending cases. As we explain *infra*, at 582–583, and n. 12, that attempt fails.

achieved the result the Government urges here weighs heavily against the Government's interpretation. See *Doe* v. *Chao*, 540 U. S. 614, 621–623 (2004).[10]

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[10] We note that statements made by Senators preceding passage of the DTA lend further support to what the text of the DTA and its drafting history already make plain. Senator Levin, one of the sponsors of the final bill, objected to earlier versions of the DTA's "effective date" provision that would have made subsection (e)(1) applicable to pending cases. See, *e. g.*, 151 Cong. Rec. S12667 (Nov. 10, 2005) (amendment proposed by Sen. Graham that would have rendered what is now subsection (e)(1) applicable to "any application or other action that is pending on or after the date of the enactment of this Act"). Senator Levin urged adoption of an alternative amendment that "would apply only to new habeas cases filed after the date of enactment." *Id.*, at S12802 (Nov. 15, 2005). That alternative amendment became the text of subsection (h)(2). (In light of the extensive discussion of the DTA's effect on pending cases prior to passage of the DTA, see, *e. g.*, *id.*, at S12664 (Nov. 10, 2005); *id.*, at S12755 (Nov. 14, 2005); *id.*, at S12799–S12802 (Nov. 15, 2005); *id.*, at S14245, S14252–S14253, S14257–S14258, S14274–S14275 (Dec. 21, 2005), it cannot be said that the changes to subsection (h)(2) were inconsequential. Cf. *post*, at 668 (SCALIA, J., dissenting).)

While statements attributed to the final bill's two other sponsors, Senators Graham and Kyl, arguably contradict Senator Levin's contention that the final version of the DTA preserved jurisdiction over pending habeas cases, see 151 Cong. Rec. S14263–S14264 (Dec. 21, 2005), those statements appear to have been inserted into the Congressional Record *after* the Senate debate. See Reply Brief for Petitioner 5, n. 6; see also 151 Cong. Rec. S14260 (statement of Sen. Kyl) ("I would like to say a few words about the *now-completed* National Defense Authorization Act for fiscal year 2006" (emphasis added)). All statements made during the debate itself support Senator Levin's understanding that the final text of the DTA would not render subsection (e)(1) applicable to pending cases. See, *e. g.*, *id.*, at S14245, S14252–S14253, S14274–S14275 (Dec. 21, 2005). The statements that JUSTICE SCALIA cites as evidence to the contrary construe *subsection (e)(3)* to strip this Court of jurisdiction, see *post*, at 666, n. 4 (dissenting opinion) (quoting 151 Cong. Rec. S12796 (Nov. 15, 2005) (statement of Sen. Specter))—a construction that the Government has expressly disavowed in this litigation, see n. 11, *infra*. The inapposite November 14, 2005, statement of Senator Graham, which JUSTICE SCALIA cites as evidence of that Senator's "assumption that pending cases are covered," *post*, at 666,

The Government nonetheless offers two reasons why, in its view, no negative inference may be drawn in favor of jurisdiction. First, it asserts that *Lindh* is inapposite because "Section 1005(e)(1) and (h)(1) remove jurisdiction, while Section 1005(e)(2), (3) and (h)(2) create an exclusive review mechanism and define the nature of that review." Reply Brief in Support of Respondents' Motion to Dismiss 4. Because the provisions being contrasted "address wholly distinct subject matters," *Martin* v. *Hadix*, 527 U. S. 343, 356 (1999), the Government argues, Congress' different treatment of them is of no significance.

This argument must fail because it rests on a false distinction between the "jurisdictional" nature of subsection (e)(1) and the "procedural" character of subsections (e)(2) and (e)(3). In truth, all three provisions govern jurisdiction over detainees' claims; subsection (e)(1) addresses jurisdiction in habeas cases and other actions "relating to any aspect of the detention," while subsections (e)(2) and (e)(3) vest exclusive,[11] but limited, *jurisdiction* in the Court of Appeals for the District of Columbia Circuit to review "final decision[s]" of CSRTs and military commissions.

That subsection (e)(1) strips jurisdiction while subsections (e)(2) and (e)(3) restore it in limited form is hardly a distinction upon which a negative inference must founder. JUSTICE SCALIA, in arguing to the contrary, maintains that Con-

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and n. 3 (citing 151 Cong. Rec. S12756 (Nov. 14, 2005)), follows directly after the uncontradicted statement of his cosponsor, Senator Levin, assuring members of the Senate that "the amendment will not strip the courts of jurisdiction over [pending] cases," *id.*, at S12755.

[11] The District of Columbia Circuit's jurisdiction, while "exclusive" in one sense, would not bar this Court's review on appeal from a decision under the DTA. See Reply Brief in Support of Respondents' Motion to Dismiss 16–17, n. 12 ("While the DTA does not expressly call for Supreme Court review of the District of Columbia Circuit's decisions, Section[s] 1005(e)(2) and (3) . . . do not remove this Court's jurisdiction over such decisions under 28 U. S. C. § 1254(1)").

gress had "ample reason" to provide explicitly for application of subsections (e)(2) and (e)(3) to pending cases because "jurisdiction-ousting" provisions like subsection (e)(1) have been treated differently under our retroactivity jurisprudence than "jurisdiction-creating" ones like subsections (e)(2) and (e)(3). *Post*, at 662 (dissenting opinion); see also Reply Brief in Support of Respondents' Motion to Dismiss 5–6. That theory is insupportable. Assuming, *arguendo*, that subsections (e)(2) and (e)(3) "confer *new* jurisdiction (in the D. C. Circuit) where there was none before," *post*, at 662 (emphasis in original); but see *Rasul* v. *Bush*, 542 U. S. 466 (2004), and that our precedents can be read to "strongly indicat[e]" that jurisdiction-creating statutes raise special retroactivity concerns not also raised by jurisdiction-stripping statutes, *post*, at 662,[12] subsections (e)(2) and (e)(3) "confer" jurisdiction in a manner that cannot conceivably give rise to retroactivity questions under our precedents. The provisions impose no additional liability or obligation on any private party or even on the United States, unless one counts the burden of litigating an appeal—a burden not a single one of our cases suggests triggers retroactivity concerns.[13]

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[12] This assertion is itself highly questionable. The cases that JUSTICE SCALIA cites to support his distinction are *Republic of Austria* v. *Altmann*, 541 U. S. 677 (2004), and *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939 (1997). See *post*, at 662. While the Court in both of those cases recognized that statutes "creating" jurisdiction may have retroactive effect if they affect "substantive" rights, see *Altmann*, 541 U. S., at 695, and n. 15; *Hughes Aircraft*, 520 U. S., at 951, we have applied the same analysis to statutes that have jurisdiction-stripping effect, see *Lindh* v. *Murphy*, 521 U. S. 320, 327–328 (1997); *id.*, at 342–343 (Rehnquist, C. J., dissenting) (construing AEDPA's amendments as "ousting jurisdiction").

[13] See *Landgraf*, 511 U. S., at 271, n. 25 (observing that "the great majority of our decisions relying upon the antiretroactivity presumption have involved intervening statutes burdening private parties," though "we have applied the presumption in cases involving *new monetary obligations* that fell only on the government" (emphasis added)); see also *Altmann*, 541 U. S., at 728–729 (KENNEDY, J., dissenting) (explaining that if retroactivity

Moreover, it strains credulity to suggest that the desire to reinforce the application of subsections (e)(2) and (e)(3) to pending cases drove Congress to *exclude* subsection (e)(1) from § 1005(h)(2).

The Government's second objection is that applying subsections (e)(2) and (e)(3) but not (e)(1) to pending cases "produces an absurd result" because it grants (albeit only temporarily) dual jurisdiction over detainees' cases in circumstances where the statute plainly envisions that the D. C. Circuit will have "*exclusive*" and immediate jurisdiction over such cases. Reply Brief in Support of Respondents' Motion to Dismiss 7. But the premise here is faulty; subsections (e)(2) and (e)(3) grant jurisdiction only over actions to "determine the validity of any final decision" of a CSRT or commission. Because Hamdan, at least, is not contesting any "final decision" of a CSRT or military commission, his action does not fall within the scope of subsection (e)(2) or (e)(3). There is, then, no absurdity.[14]

The Government's more general suggestion that Congress can have had no good reason for preserving habeas jurisdiction over cases that had been brought by detainees prior to enactment of the DTA not only is belied by the legislative history, see n. 10, *supra*, but is otherwise without merit. There is nothing absurd about a scheme under which pending habeas actions—particularly those, like this one, that challenge the very legitimacy of the tribunals whose judgments Congress would like to have reviewed—are preserved, and more routine challenges to final decisions ren-

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concerns do not arise when a new monetary obligation is imposed on the United States it is because "Congress, by virtue of authoring the legislation, is itself fully capable of protecting the Federal Government from having its rights degraded by retroactive laws").

[14] There may be habeas cases that were pending in the lower courts at the time the DTA was enacted that do qualify as challenges to "final decision[s]" within the meaning of subsection (e)(2) or (e)(3). We express no view about whether the DTA would require transfer of such an action to the D. C. Circuit.

dered by those tribunals are carefully channeled to a particular court and through a particular lens of review.

Finally, we cannot leave unaddressed JUSTICE SCALIA's contentions that the "meaning of § 1005(e)(1) is entirely clear," *post*, at 660, and that "the *plain import* of a statute repealing jurisdiction is to eliminate the power to consider and render judgment—in an already pending case no less than in a case yet to be filed," *post*, at 657 (emphasis in original). Only by treating the *Bruner* rule as an inflexible trump (a thing it has never been, see n. 7, *supra*) and ignoring both the rest of § 1005's text and its drafting history can one conclude as much. Congress here expressly provided that subsections (e)(2) and (e)(3) applied to pending cases. It chose not to so provide—after having been presented with the option—for subsection (e)(1). The omission is an integral part of the statutory scheme that muddies whatever "plain meaning" may be discerned from blinkered study of subsection (e)(1) alone. The dissent's speculation about what Congress might have intended by the omission not only is counterfactual, cf. n. 10, *supra* (recounting legislative history), but rests on both a misconstruction of the DTA and an erroneous view of our precedents, see *supra*, at 582–583, and n. 12.

For these reasons, we deny the Government's motion to dismiss.[15]

III

Relying on our decision in *Councilman*, 420 U. S. 738, the Government argues that, even if we have statutory jurisdic-

[15] Because we conclude that § 1005(e)(1) does not strip federal courts' jurisdiction over cases pending on the date of the DTA's enactment, we do not decide whether, if it were otherwise, this Court would nonetheless retain jurisdiction to hear Hamdan's appeal. Cf. *supra*, at 575. Nor do we decide the manner in which the canon of constitutional avoidance should affect subsequent interpretation of the DTA. See, *e. g.*, *St. Cyr*, 533 U. S., at 300 (a construction of a statute "that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions").

tion, we should apply the "judge-made rule that civilian courts should await the final outcome of on-going military proceedings before entertaining an attack on those proceedings." Brief for Respondents 12. Like the District Court and the Court of Appeals before us, we reject this argument.

In *Councilman*, an army officer on active duty was referred to a court-martial for trial on charges that he violated the UCMJ by selling, transferring, and possessing marijuana. 420 U. S., at 739–740. Objecting that the alleged offenses were not "'service connected,'" *id.*, at 740, the officer filed suit in Federal District Court to enjoin the proceedings. He neither questioned the lawfulness of courts-martial or their procedures nor disputed that, as a serviceman, he was subject to court-martial jurisdiction. His sole argument was that the subject matter of his case did not fall within the scope of court-martial authority. See *id.*, at 741, 759. The District Court granted his request for injunctive relief, and the Court of Appeals affirmed.

We granted certiorari and reversed. *Id.*, at 761. We did not reach the merits of whether the marijuana charges were sufficiently "service connected" to place them within the subject-matter jurisdiction of a court-martial. Instead, we concluded that, as a matter of comity, federal courts should normally abstain from intervening in pending court-martial proceedings against members of the Armed Forces,[16] and

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[16] *Councilman* distinguished service personnel from civilians, whose challenges to ongoing military proceedings are cognizable in federal court. See, *e. g.*, *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955). As we explained in *Councilman*, abstention is not appropriate in cases in which individuals raise "'substantial arguments denying the right of the military to try them at all,'" and in which the legal challenge "turn[s] on the status of the persons as to whom the military asserted its power." 420 U. S., at 759 (quoting *Noyd* v. *Bond*, 395 U. S. 683, 696, n. 8 (1969)). In other words, we do not apply *Councilman* abstention when there is a substantial question whether a military tribunal has personal jurisdiction over the defendant. Because we conclude that abstention is inappropriate

further that there was nothing in the particular circumstances of the officer's case to displace that general rule. See *id.*, at 740, 758.

Councilman identifies two considerations of comity that together favor abstention pending completion of ongoing court-martial proceedings against service personnel. See *New* v. *Cohen*, 129 F. 3d 639, 643 (CADC 1997); see also 415 F. 3d, at 36–37 (discussing *Councilman* and *New*). First, military discipline and, therefore, the efficient operation of the Armed Forces are best served if the military justice system acts without regular interference from civilian courts. See *Councilman*, 420 U. S., at 752. Second, federal courts should respect the balance that Congress struck between military preparedness and fairness to individual service members when it created "an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges 'completely removed from all military influence or persuasion . . . .'" *Id.*, at 758 (quoting H. R. Rep. No. 491, 81st Cong., 1st Sess., 7 (1949)). Just as abstention in the face of ongoing state criminal proceedings is justified by our expectation that state courts will enforce federal rights, so abstention in the face of ongoing court-martial proceedings is justified by our expectation that the military court system established by Congress—with its substantial procedural protections and provision for appellate review by independent civilian judges—"will vindicate servicemen's constitutional rights," 420 U. S., at 758. See *id.*, at 755–758.[17]

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for a more basic reason, we need not consider whether the jurisdictional exception recognized in *Councilman* applies here.

[17] See also *Noyd*, 395 U. S., at 694–696 (noting that the Court of Military Appeals consisted of "disinterested civilian judges," and concluding that there was no reason for the Court to address an Air Force Captain's argument that he was entitled to remain free from confinement pending appeal of his conviction by court-martial "when the highest military court stands ready to consider petitioner's arguments"). Cf. *Parisi* v. *Davidson*, 405

The same cannot be said here; indeed, neither of the comity considerations identified in *Councilman* weighs in favor of abstention in this case. First, Hamdan is not a member of our Nation's Armed Forces, so concerns about military discipline do not apply. Second, the tribunal convened to try Hamdan is not part of the integrated system of military courts, complete with independent review panels, that Congress has established. Unlike the officer in *Councilman*, Hamdan has no right to appeal any conviction to the civilian judges of the Court of Military Appeals (now called the United States Court of Appeals for the Armed Forces, see § 924, 108 Stat. 2831). Instead, under Dept. of Defense Military Commission Order No. 1 (Commission Order No. 1), App. C to Brief for Petitioner 46a, which was issued by the Secretary of Defense on March 21, 2002, and amended most recently on August 31, 2005, and which governs the procedures for Hamdan's commission, any conviction would be reviewed by a panel consisting of three military officers designated by the Secretary. *Id.*, § 6(H)(4). Commission Order No. 1 provides that appeal of a review panel's decision may be had only to the Secretary himself, § 6(H)(5), and then, finally, to the President, § 6(H)(6).[18]

We have no doubt that the various individuals assigned review power under Commission Order No. 1 would strive to act impartially and ensure that Hamdan receive all protections to which he is entitled. Nonetheless, these review bodies clearly lack the structural insulation from military influence that characterizes the Court of Appeals for the

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U. S. 34, 41–43 (1972) ("Under accepted principles of comity, the court should stay its hand only if the relief the petitioner seeks . . . would also be available to him with reasonable promptness and certainty through the machinery of the military judicial system in its processing of the court-martial charge").

[18] If he chooses, the President may delegate this ultimate decision-making authority to the Secretary of Defense. See § 6(H)(6).

Armed Forces, and thus bear insufficient conceptual similarity to state courts to warrant invocation of abstention principles.[19]

In sum, neither of the two comity considerations underlying our decision to abstain in *Councilman* applies to the circumstances of this case. Instead, this Court's decision in *Quirin* is the most relevant precedent. In *Quirin*, eight German saboteurs were captured upon arrival by submarine in New York and Florida. 317 U. S., at 21. The President convened a military commission to try seven of the saboteurs, who then filed habeas corpus petitions in the United States District Court for the District of Columbia challenging their trial by commission. We granted the saboteurs' petition for certiorari to the Court of Appeals before judgment. See *id.*, at 19. Far from abstaining pending the conclusion of military proceedings, which were ongoing, we convened a special Term to hear the case and expedited our review. That course of action was warranted, we explained, "[i]n view of the public importance of the questions raised by [the cases] and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay." *Ibid.*

As the Court of Appeals here recognized, *Quirin* "provides a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the

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[19] JUSTICE SCALIA chides us for failing to include the D. C. Circuit's review powers under the DTA in our description of the review mechanism erected by Commission Order No. 1. See *post*, at 675. Whether or not the limited review permitted under the DTA may be treated as akin to the plenary review exercised by the Court of Appeals for the Armed Forces, petitioner here is not afforded a right to such review. See *infra*, at 616; § 1005(e)(3), 119 Stat. 2743.

processes of military commissions." 415 F. 3d, at 36.[20] The circumstances of this case, like those in *Quirin*, simply do not implicate the "obligations of comity" that, under appropriate circumstances, justify abstention. *Quackenbush* v. *Allstate Ins. Co.*, 517 U. S. 706, 733 (1996) (KENNEDY, J., concurring).

Finally, the Government has identified no other "important countervailing interest" that would permit federal courts to depart from their general "duty to exercise the jurisdiction that is conferred upon them by Congress." *Id.*, at 716 (majority opinion). To the contrary, Hamdan and the Government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law and oper-

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[20] Having correctly declined to abstain from addressing Hamdan's challenge to the lawfulness of the military commission convened to try him, the Court of Appeals suggested that *Councilman* abstention nonetheless applied to bar its consideration of one of Hamdan's arguments—namely, that his commission violated Article 3 of the Third Geneva Convention, 6 U. S. T. 3316, 3318. See Part VI, *infra*. Although the Court of Appeals rejected the Article 3 argument on the merits, it also stated that, because the challenge was not "jurisdictional," it did not fall within the exception that *Schlesinger* v. *Councilman*, 420 U. S. 738 (1975), recognized for defendants who raise substantial arguments that a military tribunal lacks personal jurisdiction over them. See 415 F. 3d, at 42.

In reaching this conclusion, the Court of Appeals conflated two distinct inquiries: (1) whether Hamdan has raised a substantial argument that the military commission lacks authority to try him; and, more fundamentally, (2) whether the comity considerations underlying *Councilman* apply to trigger the abstention principle in the first place. As the Court of Appeals acknowledged at the beginning of its opinion, the first question warrants consideration only if the answer to the second is yes. See 415 F. 3d, at 36–37. Since, as the Court of Appeals properly concluded, the answer to the second question is in fact no, there is no need to consider any exception.

At any rate, it appears that the exception would apply here. As discussed in Part VI, *infra*, Hamdan raises a substantial argument that, because the military commission that has been convened to try him is not a "'regularly constituted court'" under the Geneva Conventions, it is ultra vires and thus lacks jurisdiction over him. Brief for Petitioner 5.

ates free from many of the procedural rules prescribed by Congress for courts-martial—rules intended to safeguard the accused and ensure the reliability of any conviction. While we certainly do not foreclose the possibility that abstention may be appropriate in some cases seeking review of ongoing military commission proceedings (such as military commissions convened on the battlefield), the foregoing discussion makes clear that, under our precedent, abstention is not justified here. We therefore proceed to consider the merits of Hamdan's challenge.

IV

The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity. See W. Winthrop, Military Law and Precedents 831 (rev. 2d ed. 1920) (hereinafter Winthrop). Though foreshadowed in some respects by earlier tribunals like the Board of General Officers that General Washington convened to try British Major John André for spying during the Revolutionary War, the commission "as such" was inaugurated in 1847. *Id.*, at 832; G. Davis, A Treatise on the Military Law of the United States 308 (rev. 3d ed. 1915) (hereinafter Davis). As commander of occupied Mexican territory, and having available to him no other tribunal, General Winfield Scott that year ordered the establishment of both "'*military commissions*'" to try ordinary crimes committed in the occupied territory and a "*council of war*" to try offenses against the law of war. Winthrop 832 (emphasis in original).

When the exigencies of war next gave rise to a need for use of military commissions, during the Civil War, the dual system favored by General Scott was not adopted. Instead, a single tribunal often took jurisdiction over ordinary crimes, war crimes, and breaches of military orders alike. As further discussed below, each aspect of that seemingly broad jurisdiction was in fact supported by a separate military exigency. Generally, though, the need for military com-

missions during this period—as during the Mexican War—was driven largely by the then very limited jurisdiction of courts-martial: "The *occasion* for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offences defined in a written code." *Id.*, at 831 (emphasis in original).

Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, §8, and Article III, §1, of the Constitution unless some other part of that document authorizes a response to the felt need. See *Ex parte Milligan*, 4 Wall. 2, 121 (1866) ("Certainly no part of the judicial power of the country was conferred on [military commissions]"); *Ex parte Vallandigham*, 1 Wall. 243, 251 (1864); see also *Quirin*, 317 U. S., at 25 ("Congress and the President, like the courts, possess no power not derived from the Constitution"). And that authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war. See *id.*, at 26–29; *In re Yamashita*, 327 U. S. 1, 11 (1946).

The Constitution makes the President the "Commander in Chief" of the Armed Forces, Art. II, §2, cl. 1, but vests in Congress the powers to "declare War . . . and make Rules concerning Captures on Land and Water," Art. I, §8, cl. 11, to "raise and support Armies," *id.*, cl. 12, to "define and punish . . . Offences against the Law of Nations," *id.*, cl. 10, and "To make Rules for the Government and Regulation of the land and naval Forces," *id.*, cl. 14. The interplay between these powers was described by Chief Justice Chase in the seminal case of *Ex parte Milligan:*

> "The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in

> peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. . . . Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature." 4 Wall., at 139–140.[21]

Whether Chief Justice Chase was correct in suggesting that the President may constitutionally convene military commissions "without the sanction of Congress" in cases of "controlling necessity" is a question this Court has not answered definitively, and need not answer today. For we held in *Quirin* that Congress had, through Article of War 15, sanctioned the use of military commissions in such circumstances. 317 U. S., at 28 ("By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases"). Article 21 of the UCMJ, the language of which is substantially identical to the old Article 15 and was preserved by Congress after World War II,[22] reads as follows:

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[21] See also Winthrop 831 ("[I]n general, it is those provisions of the Constitution which empower Congress to 'declare war' and 'raise armies,' and which, in authorizing the initiation of *war*, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction" (emphasis in original)).

[22] Article 15 was first adopted as part of the Articles of War in 1916. See Act of Aug. 29, 1916, ch. 418, §3, Art. 15, 39 Stat. 652. When the Articles of War were codified and reenacted as the UCMJ in 1950, Congress determined to retain Article 15 because it had been "construed by the Supreme Court (*Ex Parte Quirin*, 317 U. S. 1 (1942))." S. Rep. No. 486, 81st Cong., 1st Sess., 13 (1949).

"Jurisdiction of courts-martial not exclusive.

"The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals." 64 Stat. 115.

We have no occasion to revisit *Quirin*'s controversial characterization of Article of War 15 as congressional authorization for military commissions. Cf. Brief for Legal Scholars and Historians as *Amici Curiae* 12–15. Contrary to the Government's assertion, however, even *Quirin* did not view the authorization as a sweeping mandate for the President to "invoke military commissions when he deems them necessary." Brief for Respondents 17. Rather, the *Quirin* Court recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions—with the express condition that the President and those under his command comply with the law of war. See 317 U. S., at 28–29.[23] That much is evidenced by the Court's inquiry, *following* its conclusion that Congress had authorized military commissions, into whether the law of war had indeed been complied with in that case. See *ibid.*

The Government would have us dispense with the inquiry that the *Quirin* Court undertook and find in either the AUMF or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the

[23] Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 637 (1952) (Jackson, J., concurring). The Government does not argue otherwise.

President's authority to convene military commissions. First, while we assume that the AUMF activated the President's war powers, see *Hamdi* v. *Rumsfeld*, 542 U. S. 507 (2004) (plurality opinion), and that those powers include the authority to convene military commissions in appropriate circumstances, see *id.*, at 518; *Quirin*, 317 U. S., at 28–29; see also *Yamashita*, 327 U. S., at 11, there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ. Cf. *Yerger*, 8 Wall., at 105 ("Repeals by implication are not favored").[24]

Likewise, the DTA cannot be read to authorize this commission. Although the DTA, unlike either Article 21 or the AUMF, was enacted after the President had convened Hamdan's commission, it contains no language authorizing that tribunal or any other at Guantanamo Bay. The DTA obviously "recognize[s]" the existence of the Guantanamo Bay commissions in the weakest sense, Brief for Respondents 15, because it references some of the military orders governing them and creates limited judicial review of their "final decision[s]," DTA § 1005(e)(3), 119 Stat. 2743. But the statute also pointedly reserves judgment on whether "the Constitution and laws of the United States are applicable" in reviewing such decisions and whether, if they are, the "standards and procedures" used to try Hamdan and other detainees actually violate the "Constitution and laws." *Ibid.*

Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene mil-

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[24] On this point, it is noteworthy that the Court in *Ex parte Quirin*, 317 U. S. 1 (1942), looked beyond Congress' declaration of war and accompanying authorization for use of force during World War II, and relied instead on Article of War 15 to find that Congress had authorized the use of military commissions in some circumstances. See *id.*, at 26–29. JUSTICE THOMAS' assertion that we commit "error" in reading Article 21 of the UCMJ to place limitations upon the President's use of military commissions, see *post*, at 682 (dissenting opinion), ignores the reasoning in *Quirin*.

itary commissions in circumstances where justified under the "Constitution and laws," including the law of war. Absent a more specific congressional authorization, the task of this Court is, as it was in *Quirin*, to decide whether Hamdan's military commission is so justified. It is to that inquiry we now turn.

V

The common law governing military commissions may be gleaned from past practice and what sparse legal precedent exists. Commissions historically have been used in three situations. See Bradley & Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2048, 2132–2133 (2005); Winthrop 831–846; Hearings on H. R. 2498 before the Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess., 975 (1949). First, they have substituted for civilian courts at times and in places where martial law has been declared. Their use in these circumstances has raised constitutional questions, see *Duncan* v. *Kahanamoku*, 327 U. S. 304 (1946); *Milligan*, 4 Wall., at 121–122, but is well recognized.[25] See Winthrop 822, 836–839. Second, commissions have been established to try civilians "as part of a temporary military government over occupied enemy territory or territory regained from an

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[25] The justification for, and limitations on, these commissions were summarized in *Milligan:*

"If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." 4 Wall., at 127 (emphasis in original).

enemy where civilian government cannot and does not function." *Duncan*, 327 U. S., at 314; see *Milligan*, 4 Wall., at 141–142 (Chase, C. J., concurring in judgment) (distinguishing "MARTIAL LAW PROPER" from "MILITARY GOVERNMENT" in occupied territory). Illustrative of this second kind of commission is the one that was established, with jurisdiction to apply the German Criminal Code, in occupied Germany following the end of World War II. See *Madsen* v. *Kinsella*, 343 U. S. 341, 356 (1952).[26]

The third type of commission, convened as an "incident to the conduct of war" when there is a need "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war," *Quirin*, 317 U. S., at 28–29, has been described as "utterly different" from the other two. Bickers, Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe, 34 Tex. Tech. L. Rev. 899, 902 (2002–2003).[27] Not only is its jurisdiction limited to offenses cognizable during time of war, but its role is primarily a factfinding one—to determine, typically on the battle-

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[26] The limitations on these occupied territory or military government commissions are tailored to the tribunals' purpose and the exigencies that necessitate their use. They may be employed "pending the establishment of civil government," *Madsen*, 343 U. S., at 354–355, which may in some cases extend beyond the "cessation of hostilities," *id.*, at 348.

[27] So much may not be evident on cold review of the Civil War trials often cited as precedent for this kind of tribunal because the commissions established during that conflict operated as both martial law or military government tribunals and law-of-war commissions. Hence, "military commanders began the practice [during the Civil War] of using the same name, the same rules, and often, the same tribunals" to try both ordinary crimes and war crimes. Bickers, 34 Tex. Tech. L. Rev., at 908. "For the first time, accused horse thieves and alleged saboteurs found themselves subject to trial by the same military commission." *Id.*, at 909. The Civil War precedents must therefore be considered with caution; as we recognized in *Quirin*, 317 U. S., at 29, and as further discussed below, commissions convened during time of war but under neither martial law nor military government may try only offenses against the law of war.

field itself, whether the defendant has violated the law of war. The last time the U. S. Armed Forces used the law-of-war military commission was during World War II. In *Quirin*, this Court sanctioned President Roosevelt's use of such a tribunal to try Nazi saboteurs captured on American soil during the War. 317 U. S. 1. And in *Yamashita*, we held that a military commission had jurisdiction to try a Japanese commander for failing to prevent troops under his command from committing atrocities in the Philippines. 327 U. S. 1.

Quirin is the model the Government invokes most frequently to defend the commission convened to try Hamdan. That is both appropriate and unsurprising. Since Guantanamo Bay is neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available. At the same time, no more robust model of executive power exists; *Quirin* represents the high-water mark of military power to try enemy combatants for war crimes.

The classic treatise penned by Colonel William Winthrop, whom we have called "the 'Blackstone of Military Law,'" *Reid* v. *Covert*, 354 U. S. 1, 19, n. 38 (1957) (plurality opinion), describes at least four preconditions for exercise of jurisdiction by a tribunal of the type convened to try Hamdan. First, "[a] military commission, (except where otherwise authorized by statute), can legally assume jurisdiction only of offences committed within the field of the command of the convening commander." Winthrop 836. The "field of the command" in these circumstances means the "theatre of war." *Ibid.* Second, the offense charged "must have been committed within the period of the war."[28] *Id.*, at 837. No jurisdiction exists to try offenses "committed either before or after the war." *Ibid.* Third, a military commission not established pursuant to martial law or an occupation may try

[28] If the commission is established pursuant to martial law or military government, its jurisdiction extends to offenses committed within "the exercise of military government or martial law." Winthrop 837.

only "[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war" and members of one's own army "who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war." *Id.*, at 838. Finally, a law-of-war commission has jurisdiction to try only two kinds of offense: "Violations of the laws and usages of war cognizable by military tribunals only," and "[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war." *Id.*, at 839.[29]

All parties agree that Colonel Winthrop's treatise accurately describes the common law governing military commissions, and that the jurisdictional limitations he identifies were incorporated in Article of War 15 and, later, Article 21 of the UCMJ. It also is undisputed that Hamdan's commission lacks jurisdiction to try him unless the charge "properly set[s] forth, not only the details of the act charged, but the circumstances conferring *jurisdiction*." *Id.*, at 842 (emphasis in original). The question is whether the preconditions designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal have been satisfied here.

The charge against Hamdan, described in detail in Part I, *supra*, alleges a conspiracy extending over a number of years, from 1996 to November 2001.[30] All but two months of that more than 5-year-long period preceded the attacks of

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[29] Winthrop adds as a fifth, albeit not-always-complied-with, criterion that "the *trial* must be had within the theatre of war . . . ; that, if held elsewhere, and where the civil courts are open and available, the proceedings and sentence will be *coram non judice*." *Id.*, at 836. The Government does not assert that Guantanamo Bay is a theater of war, but instead suggests that neither Washington, D. C., in 1942 nor the Philippines in 1945 qualified as a "war zone" either. Brief for Respondents 27; cf. *Quirin*, 317 U. S. 1; *In re Yamashita*, 327 U. S. 1 (1946).

[30] The elements of this conspiracy charge have been defined not by Congress but by the President. See Military Commission Instruction No. 2, 32 CFR § 11.6 (2005).

September 11, 2001, and the enactment of the AUMF—the Act of Congress on which the Government relies for exercise of its war powers and thus for its authority to convene military commissions.[31] Neither the purported agreement with

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[31] JUSTICE THOMAS would treat Usama bin Laden's 1996 declaration of jihad against Americans as the inception of the war. See *post*, at 683–688 (dissenting opinion). But even the Government does not go so far; although the United States had for some time prior to the attacks of September 11, 2001, been aggressively pursuing al Qaeda, neither in the charging document nor in submissions before this Court has the Government asserted that the President's *war powers* were activated prior to September 11, 2001. Cf. Brief for Respondents 25 (describing the events of September 11, 2001, as "an act of war" that "triggered a right to deploy military forces abroad to defend the United States by combating al Qaeda"). JUSTICE THOMAS' further argument that the AUMF is "backward looking" and therefore authorizes *trial by military commission* of crimes that occurred prior to the inception of war is insupportable. See *post*, at 685, n. 3. If nothing else, Article 21 of the UCMJ requires that the President comply with the law of war in his use of military commissions. As explained in the text, the law of war permits trial only of offenses "committed within the period of the war." Winthrop 837; see also *Quirin*, 317 U. S., at 28–29 (observing that law-of-war military commissions may be used to try "those enemies *who in their attempt to thwart or impede our military effort* have violated the law of war" (emphasis added)). The sources that JUSTICE THOMAS relies on to suggest otherwise simply do not support his position. Colonel Green's short exegesis on military commissions cites Howland for the proposition that "[o]ffenses committed before a *formal declaration of war* or *before the declaration of martial law* may be tried by military commission." The Military Commission, 42 Am. J. Int'l L. 832, 848 (1948) (emphasis added) (cited *post*, at 686). Assuming that to be true, nothing in our analysis turns on the admitted absence of either a formal declaration of war or a declaration of martial law. Our focus instead is on the September 11, 2001, attacks that the Government characterizes as the relevant "act[s] of war," and on the measure that authorized the President's deployment of military force—the AUMF. Because we do not question the Government's position that the war commenced with the events of September 11, 2001, the *Prize Cases*, 2 Black 635 (1863) (cited *post*, at 679, 684, 685, and 687 (THOMAS, J., dissenting)), are not germane to the analysis.

Finally, JUSTICE THOMAS' assertion that Julius Otto Kuehn's trial by military commission "for conspiring with Japanese officials to betray the United States Fleet to the Imperial Japanese Government prior to its

Usama bin Laden and others to commit war crimes, nor a single overt act, is alleged to have occurred in a theater of war or on any specified date after September 11, 2001. None of the overt acts that Hamdan is alleged to have committed violates the law of war.

These facts alone cast doubt on the legality of the charge and, hence, the commission; as Winthrop makes plain, the offense alleged must have been committed both in a theater of war and *during*, not before, the relevant conflict. But the deficiencies in the time and place allegations also underscore—indeed are symptomatic of—the most serious defect of this charge: The offense it alleges is not triable by law-of-war military commission. See *Yamashita*, 327 U. S., at 13 ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is of a violation of the law of war").[32]

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attack on Pearl Harbor" stands as authoritative precedent for Hamdan's trial by commission, *post*, at 686, misses the mark in three critical respects. First, Kuehn was tried for *federal espionage crimes* under what were then 50 U. S. C. §§31, 32, and 34, *not* with common-law violations of the law of war. See Hearings before the Joint Committee on the Investigation of the Pearl Harbor Attack, 79th Cong., 1st Sess., pt. 30, pp. 3067–3069 (1946). Second, he was tried by *martial law* commission (a kind of commission JUSTICE THOMAS acknowledges is not relevant to the analysis here, and whose jurisdiction extends to offenses committed within "the exercise of . . . martial law," Winthrop 837; see, n. 28, *supra*), not a commission established exclusively to try violations of the law of war, see Winthrop 837. Third, the martial law commissions established to try crimes in Hawaii were ultimately declared illegal by this Court. See *Duncan* v. *Kahanamoku*, 327 U. S. 304, 324 (1946) ("The phrase 'martial law' as employed in [the Hawaiian Organic Act], while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals").

[32] JUSTICE THOMAS adopts the remarkable view, not advocated by the Government, that the charging document in this case actually includes more than one charge: Conspiracy *and* several other ill-defined crimes,

There is no suggestion that Congress has, in exercise of its constitutional authority to "define and punish . . . Offences against the Law of Nations," U. S. Const., Art. I, § 8, cl. 10,

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like "joining an organization" that has a criminal purpose, "'[b]eing a guerrilla,'" and aiding the enemy. See *post*, at 693–697, and n. 9. There are innumerable problems with this approach.

First, the crimes JUSTICE THOMAS identifies were not actually charged. It is one thing to observe that charges before a military commission "'need not be stated with the precision of a common law indictment,'" *post*, at 692, n. 7; it is quite another to say that a crime *not charged* may nonetheless be read into an indictment. Second, the Government plainly had available to it the tools and the time it needed to charge petitioner with the various crimes JUSTICE THOMAS refers to, if it believed they were supported by the allegations. As JUSTICE THOMAS himself observes, see *post*, at 697, the crime of aiding the enemy may, in circumstances where the accused owes allegiance to the party whose enemy he is alleged to have aided, be triable by military commission pursuant to Article 104 of the UCMJ, 10 U. S. C. § 904. Indeed, the Government has charged detainees under this provision when it has seen fit to do so. See Brief for David Hicks as *Amicus Curiae* 7.

Third, the cases JUSTICE THOMAS relies on to show that Hamdan may be guilty of violations of the law of war not actually charged do not support his argument. JUSTICE THOMAS begins by blurring the distinction between those categories of "offender" who may be tried by military commission (*e. g.*, jayhawkers and the like) with the "offenses" that may be so tried. Even when it comes to "'being a guerrilla,'" cf. *post*, at 695, n. 9, a label alone does not render a person susceptible to execution or other criminal punishment; the charge of "'being a guerrilla'" invariably is accompanied by the allegation that the defendant "'took up arms'" as such. This is because, as explained by Judge Advocate General Holt in a decision upholding the charge of "'being a guerrilla'" as one recognized by "the universal usage of the times," the charge is simply shorthand (akin to "being a spy") for "the perpetration of a succession of similar acts" of violence. Record Books of the Judge Advocate General Office, R. 3, 590. The sources cited by JUSTICE THOMAS confirm as much. See cases cited *post*, at 694–695, n. 9.

Likewise, the suggestion that the Nuremberg precedents support Hamdan's conviction for the (uncharged) crime of joining a criminal organization must fail. Cf. *post*, at 695–697. The convictions of certain high-level Nazi officials for "membership in a criminal organization" were secured pursuant to specific provisions of the Charter of the International Military

positively identified "conspiracy" as a war crime.[33] As we explained in *Quirin*, that is not necessarily fatal to the Government's claim of authority to try the alleged offense by military commission; Congress, through Article 21 of the UCMJ, has "incorporated by reference" the common law of war, which may render triable by military commission certain offenses not defined by statute. 317 U. S., at 30. When, however, neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous. To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution. Cf. *Loving* v. *United States*, 517 U. S. 748, 771 (1996) (acknowledging that Congress "may not delegate the power to make laws"); *Reid*, 354 U. S., at 23–24 ("The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds"); The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison) ("The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny").[34]

Tribunal that permitted indictment of individual organization members following convictions of the organizations themselves. See Arts. 9 and 10, in 1 Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945–1 October 1946, p. 12 (1947). The initial plan to use organizations' convictions as predicates for mass individual trials ultimately was abandoned. See T. Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir 584–585, 638 (1992).

[33] Cf. 10 U. S. C. § 904 (making triable by military commission the crime of aiding the enemy); § 906 (same for spying); War Crimes Act of 1996, 18 U. S. C. § 2441 (2000 ed. and Supp. III) (listing war crimes); Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, § 583, 111 Stat. 2436 (same).

[34] While the common law necessarily is "evolutionary in nature," *post*, at 689 (THOMAS, J., dissenting), even in jurisdictions where common-law crimes are still part of the penal framework, an act does not become a

This high standard was met in *Quirin;* the violation there alleged was, by "universal agreement and practice" both in this country and internationally, recognized as an offense against the law of war. 317 U. S., at 30; see *id.*, at 35–36 ("This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War" (footnote omitted)). Although the picture arguably was less clear in *Yamashita*, compare 327 U. S., at 16 (stating that the provisions of the Fourth Hague Convention of 1907, 36 Stat. 2306, "plainly" required the defendant to control the troops under his command), with 327 U. S., at 35 (Murphy, J., dissenting), the disagreement between the majority and the dissenters in that case concerned whether the historic and textual evidence constituted clear precedent—not whether clear precedent was required to justify trial by law-of-war military commission.

At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war. That burden is far from satisfied here. The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military com-

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crime without its foundations having been firmly established in precedent. See, *e. g.*, *Queen* v. *Rimmington*, [2006] 2 All E. R. 257, 275–279 (2005) (House of Lords); *id.*, at 279 (while "some degree of vagueness is inevitable and development of the law is a recognised feature of common law courts[,] . . . the law-making function of the courts must remain within reasonable limits"); see also *Rogers* v. *Tennessee*, 532 U. S. 451, 472–478 (2001) (SCALIA, J., dissenting). The caution that must be exercised in the incremental development of common-law crimes by the judiciary is, for the reasons explained in the text, all the more critical when reviewing developments that stem from military action.

mission not exercising some other form of jurisdiction,[35] and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war.[36] Winthrop explains that under the common law governing military commissions, it is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt. See Winthrop 841 ("[T]he jurisdiction of the military commission should be restricted to cases of offence consisting in *overt acts, i. e.* in unlawful commissions or actual attempts to commit, and not in intentions merely" (emphasis in original)).

The Government cites three sources that it says show otherwise. First, it points out that the Nazi saboteurs in *Quirin* were charged with conspiracy. See Brief for Respondents 27. Second, it observes that Winthrop at one

[35] The 19th-century trial of the "Lincoln conspirators," even if properly classified as a trial by law-of-war commission, cf. W. Rehnquist, All the Laws But One: Civil Liberties in Wartime 165–167 (1998) (analyzing the conspiracy charges in light of ordinary criminal law principles at the time), is at best an equivocal exception. Although the charge against the defendants in that case accused them of "combining, confederating, and conspiring together" to murder the President, they were also charged (as we read the indictment, cf. *post*, at 699–700, n. 12 (THOMAS, J., dissenting)), with "maliciously, unlawfully, and traitorously murdering the said Abraham Lincoln." H. R. Doc. No. 314, 55th Cong., 3d Sess., 696 (1899). Moreover, the Attorney General who wrote the opinion defending the trial by military commission treated the charge as if it alleged the substantive offense of assassination. See 11 Op. Atty. Gen. 297 (1865) (analyzing the propriety of trying by military commission "the offence of having assassinated the President"); see also *Mudd* v. *Caldera*, 134 F. Supp. 2d 138, 140 (DC 2001).

[36] By contrast, the Geneva Conventions do extend liability for substantive war crimes to those who "orde[r]" their commission, see Third Geneva Convention, Art. 129, 6 U. S. T., at 3418, and this Court has read the Fourth Hague Convention of 1907 to impose "command responsibility" on military commanders for acts of their subordinates, see *Yamashita*, 327 U. S., at 15–16.

point in his treatise identifies conspiracy as an offense "prosecuted by military commissions." *Ibid.* (citing Winthrop 839, and n. 5). Finally, it notes that another military historian, Charles Roscoe Howland, lists conspiracy "'to violate the laws of war by destroying life or property in aid of the enemy'" as an offense that was tried as a violation of the law of war during the Civil War. Brief for Respondents 27–28 (citing C. Howland, Digest of Opinions of the Judge Advocates General of the Army 1071 (1912) (hereinafter Howland)). On close analysis, however, these sources at best lend little support to the Government's position and at worst undermine it. By any measure, they fail to satisfy the high standard of clarity required to justify the use of a military commission.

That the defendants in *Quirin* were charged with conspiracy is not persuasive, since the Court declined to address whether the offense actually qualified as a violation of the law of war—let alone one triable by military commission. The *Quirin* defendants were charged with the following offenses:

> "[I.] Violation of the law of war.
>
> "[II.] Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.
>
> "[III.] Violation of Article 82, defining the offense of spying.
>
> "[IV.] Conspiracy to commit the offenses alleged in charges [I, II, and III]." 317 U. S., at 23.

The Government, defending its charge, argued that the conspiracy alleged "constitute[d] an additional violation of the law of war." *Id.*, at 15. The saboteurs disagreed; they maintained that "[t]he charge of conspiracy can not stand if the other charges fall." *Id.*, at 8. The Court, however, declined to resolve the dispute. It concluded, first, that the

specification supporting Charge I adequately alleged a "violation of the law of war" that was not "merely colorable or without foundation." *Id.*, at 36. The facts the Court deemed sufficient for this purpose were that the defendants, admitted enemy combatants, entered upon U. S. territory in time of war without uniform "for the purpose of destroying property used or useful in prosecuting the war." That act was "a hostile and warlike" one. *Id.*, at 36, 37. The Court was careful in its decision to identify an overt, "complete" act. Responding to the argument that the saboteurs had "not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations" and therefore had not violated the law of war, the Court responded that they had actually "passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose." *Id.*, at 38. "The offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification." *Ibid.*

Turning to the other charges alleged, the Court explained that "[s]ince the first specification of Charge I sets forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge I, or to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the specifications under Charges II and III allege violations of those Articles or whether if so construed they are constitutional." *Id.*, at 46. No mention was made at all of Charge IV—the conspiracy charge.

If anything, *Quirin* supports Hamdan's argument that conspiracy is not a violation of the law of war. Not only did the Court pointedly omit any discussion of the conspiracy charge, but its analysis of Charge I placed special emphasis on the *completion* of an offense; it took seriously the saboteurs' argument that there can be no violation of a law of war—at least not one triable by military commission—without the

actual commission of or attempt to commit a "hostile and warlike act." *Id.*, at 37–38.

That limitation makes eminent sense when one considers the necessity from whence this kind of military commission grew: The need to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield. See S. Rep. No. 130, 64th Cong., 1st Sess., 40 (1916) (testimony of Brig. Gen. Enoch H. Crowder) (observing that Article of War 15 preserves the power of "the military commander *in the field in time of war*" to use military commissions (emphasis added)). The same urgency would not have been felt vis-à-vis enemies who had done little more than agree to violate the laws of war. Cf. 31 Op. Atty. Gen. 356, 357, 361 (1918) (opining that a German spy could not be tried by military commission because, having been apprehended before entering "any camp, fortification or other military premises of the United States," he had "committed [his offenses] outside of the field of military operations"). The *Quirin* Court acknowledged as much when it described the President's authority to use law-of-war military commissions as the power to "seize and subject to disciplinary measures those enemies *who in their attempt to thwart or impede our military effort* have violated the law of war." 317 U. S., at 28–29 (emphasis added).

Winthrop and Howland are only superficially more helpful to the Government. Howland, granted, lists "conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy" as one of over 20 "offenses against the laws and usages of war" "passed upon and punished by military commissions." Howland 1070–1071. But while the records of cases that Howland cites following his list of offenses against the law of war support inclusion of the other offenses mentioned, they provide no support for the inclusion of conspiracy as a violation of the law of war. See *id.*, at 1071 (citing Record Books of the Judge Advocate General Office, R. 2, 144; R. 3, 401, 589, 649; R. 4, 320; R. 5,

36, 590; R. 6, 20; R. 7, 413; R. 8, 529; R. 9, 149, 202, 225, 481, 524, 535; R. 10, 567; R. 11, 473, 513; R. 13, 125, 675; R. 16, 446; R. 21, 101, 280). Winthrop, apparently recognizing as much, excludes conspiracy of any kind from his own list of offenses against the law of war. See Winthrop 839–840.

Winthrop does, unsurprisingly, include "criminal conspiracies" in his list of "[c]rimes and statutory offenses cognizable by State or U. S. courts" and triable by martial law or military government commission. See *id.*, at 839. And, in a footnote, he cites several Civil War examples of "conspiracies of this class, *or of the first and second classes combined.*" *Id.*, at 839, n. 5 (emphasis added). The Government relies on this footnote for its contention that conspiracy was triable both as an ordinary crime (a crime of the "first class") and, independently, as a war crime (a crime of the "second class"). But the footnote will not support the weight the Government places on it.

As we have seen, the military commissions convened during the Civil War functioned at once as martial law or military government tribunals and as law-of-war commissions. See n. 27, *supra*. Accordingly, they regularly tried war crimes and ordinary crimes together. Indeed, as Howland observes, "[n]ot unfrequently the crime, as charged and found, was a combination of the two species of offenses." Howland 1071; see also Davis 310, n. 2; Winthrop 842. The example he gives is "'murder in violation of the laws of war.'" Howland 1071–1072. Winthrop's conspiracy "of the first and second classes combined" is, like Howland's example, best understood as a species of compound offense of the type tried by the hybrid military commissions of the Civil War. It is not a stand-alone offense against the law of war. Winthrop confirms this understanding later in his discussion, when he emphasizes that *"overt acts"* constituting war crimes are the only proper subject at least of those military tribunals not convened to stand in for local courts. Winthrop 841, and nn. 22, 23 (citing W. Finlason, Martial Law 130 (1867); emphasis in original).

JUSTICE THOMAS cites as evidence that conspiracy is a recognized violation of the law of war the Civil War indictment against Henry Wirz, which charged the defendant with "'[m]aliciously, willfully, and traitorously . . . combining, confederating, and conspiring [with others] to injure the health and destroy the lives of soldiers in the military service of the United States . . . to the end that the armies of the United States might be weakened and impaired, in violation of the laws and customs of war.'" *Post*, at 701 (dissenting opinion) (quoting H. R. Doc. No. 314, 55th Cong., 3d Sess., 785 (1899); emphasis deleted). As shown by the specification supporting that charge, however, Wirz was alleged to have *personally committed* a number of atrocities against his victims, including torture, injection of prisoners with poison, and use of "ferocious and bloodthirsty dogs" to "seize, tear, mangle, and maim the bodies and limbs" of prisoners, many of whom died as a result. *Id.*, at 789–790. Crucially, Judge Advocate General Holt determined that one of Wirz's alleged co-conspirators, R. B. Winder, should *not* be tried by military commission because there was as yet insufficient evidence of his own personal involvement in the atrocities: "[I]n the case of R. B. Winder, *while the evidence at the trial of Wirz was deemed by the court to implicate him in the conspiracy* against the lives of all Federal prisoners in rebel hands, *no such specific overt acts of violation of the laws of war* are as yet fixed upon him as to make it expedient to prefer formal charges and bring him to trial." *Id.*, at 783 (emphasis added).[37]

[37] The other examples JUSTICE THOMAS offers are no more availing. The Civil War indictment against Robert Louden, cited *post*, at 702, alleged a conspiracy, but not one in violation of the law of war. See War Dept., General Court Martial Order No. 41, p. 20 (1864). A separate charge of "'[t]ransgression of the laws and customs of war'" made no mention of conspiracy. *Id.*, at 17. The charge against Leger Grenfel and others for conspiring to release rebel prisoners held in Chicago only supports the observation, made in the text, that the Civil War tribunals often charged hybrid crimes mixing elements of crimes ordinarily triable in civilian courts (like treason) and violations of the law of war. Judge Advo-

Finally, international sources confirm that the crime charged here is not a recognized violation of the law of war.[38] As observed above, see *supra*, at 603–604, none of the major treaties governing the law of war identifies conspiracy as a violation thereof. And the only "conspiracy" crimes that have been recognized by international war crimes tribunals (whose jurisdiction often extends beyond war crimes proper to crimes against humanity and crimes against the peace) are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a "concrete plan to wage war." 1 Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945–1 October 1946, p. 225 (1947) (hereinafter Trial of Major War Criminals). The International Military Tribunal at Nuremberg, over the prosecution's objections, pointedly refused to recognize as a violation of the law of war conspiracy to commit war crimes, see, *e. g.*, 22 *id.*, at 469,[39] and convicted only Hitler's most senior associates of conspiracy to wage aggressive war, see S. Pomorski, Con-

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cate General Holt, in recommending that Grenfel's death sentence be upheld (it was in fact commuted by Presidential decree, see H. R. Doc. No. 314, at 725), explained that the accused "united himself with traitors and malefactors for the overthrow of our Republic in the interest of slavery." *Id.*, at 689.

[38] The Court in *Quirin* "assume[d] that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury." 317 U. S., at 29. We need not test the validity of that assumption here because the international sources only corroborate the domestic ones.

[39] Accordingly, the Tribunal determined to "disregard the charges . . . that the defendants conspired to commit War Crimes and Crimes against Humanity." 22 Trial of Major War Criminals 469; see also *ibid.* ("[T]he Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war").

spiracy and Criminal Organization, in the Nuremberg Trial and International Law 213, 233–235 (G. Ginsburgs & V. Kudriavtsev eds. 1990). As one prominent figure from the Nuremberg trials has explained, members of the Tribunal objected to recognition of conspiracy as a violation of the law of war on the ground that "[t]he Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war." T. Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir 36 (1992); see also *id.*, at 550 (observing that Francis Biddle, who as Attorney General prosecuted the defendants in *Quirin*, thought the French judge had made a "'persuasive argument that conspiracy in the truest sense is not known to international law'").[40]

In sum, the sources that the Government and JUSTICE THOMAS rely upon to show that conspiracy to violate the law of war is itself a violation of the law of war in fact demonstrate quite the opposite. Far from making the requisite substantial showing, the Government has failed even to offer a "merely colorable" case for inclusion of conspiracy among those offenses cognizable by law-of-war military commission. Cf. *Quirin*, 317 U. S., at 36. Because the charge does not

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[40] See also 15 United Nations War Crimes Commissions, Law Reports of Trials of War Criminals 90–91 (1949) (observing that, although a few individuals were charged with conspiracy under European domestic criminal codes following World War II, "the United States Military Tribunals" established at that time did not "recognis[e] as a separate offence conspiracy to commit war crimes or crimes against humanity"). The International Criminal Tribunal for the former Yugoslavia (ICTY), drawing on the Nuremberg precedents, has adopted a "joint criminal enterprise" theory of liability, but that is a species of liability for the substantive offense (akin to aiding and abetting), not a crime on its own. See *Prosecutor* v. *Tadić*, Judgment, Case No. IT–94–1–A (ICTY App. Chamber, July 15, 1999); see also *Prosecutor* v. *Milutinović*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, Case No. IT–99–37–AR72, ¶ 26 (ICTY App. Chamber, May 21, 2003) (stating that "[c]riminal liability pursuant to a joint criminal enterprise is not a liability for . . . conspiring to commit crimes").

support the commission's jurisdiction, the commission lacks authority to try Hamdan.

The charge's shortcomings are not merely formal, but are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition—at least in the absence of specific congressional authorization—for establishment of military commissions: military necessity. Hamdan's tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities. Cf. *Rasul* v. *Bush*, 542 U. S., at 487 (KENNEDY, J., concurring in judgment) (observing that "Guantanamo Bay is . . . far removed from any hostilities"). Hamdan is charged not with an overt act for which he was caught redhanded in a theater of war and which military efficiency demands be tried expeditiously, but with an *agreement* the inception of which long predated the attacks of September 11, 2001, and the AUMF. That may well be a crime,[41] but it is not an offense that "by the law of war may be tried by military commissio[n]." 10 U. S. C. § 821. None of the overt acts alleged to have been committed in furtherance of the agreement is itself a war crime, or even necessarily occurred during time of, or in a theater of, war. Any urgent need for imposition or execution of judgment is utterly belied by the record; Hamdan was arrested in November 2001 and he was not charged until mid-2004. These simply are not the circumstances in which, by any stretch of the historical evidence or this Court's precedents, a military commission established by Executive Order under the au-

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[41] JUSTICE THOMAS' suggestion that our conclusion precludes the Government from bringing to justice those who conspire to commit acts of terrorism is therefore wide of the mark. See *post*, at 686, n. 3, 704–706. That conspiracy is not a violation of the law of war triable by military commission does not mean the Government may not, for example, prosecute by court-martial or in federal court those caught "plotting terrorist atrocities like the bombing of the Khobar Towers." *Post*, at 705.

thority of Article 21 of the UCMJ may lawfully try a person and subject him to punishment.

VI

Whether or not the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed. The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the "rules and precepts of the law of nations," *Quirin*, 317 U. S., at 28—including, *inter alia*, the four Geneva Conventions signed in 1949. See *Yamashita*, 327 U. S., at 20–21, 23–24. The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws.

A

The commission's procedures are set forth in Commission Order No. 1, which was amended most recently on August 31, 2005—after Hamdan's trial had already begun. Every commission established pursuant to Commission Order No. 1 must have a presiding officer and at least three other members, all of whom must be commissioned officers. §4(A)(1). The presiding officer's job is to rule on questions of law and other evidentiary and interlocutory issues; the other members make findings and, if applicable, sentencing decisions. §4(A)(5). The accused is entitled to appointed military counsel and may hire civilian counsel at his own expense so long as such counsel is a U. S. citizen with security clearance "at the level SECRET or higher." §§4(C)(2)–(3).

The accused also is entitled to a copy of the charge(s) against him, both in English and his own language (if different), to a presumption of innocence, and to certain other rights typically afforded criminal defendants in civilian courts and courts-martial. See §§5(A)–(P). These rights

are subject, however, to one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to "close." Grounds for such closure "include the protection of information classified or classifiable . . . ; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests." §6(B)(3).[42] Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to his or her client what took place therein. *Ibid.*

Another striking feature of the rules governing Hamdan's commission is that they permit the admission of *any* evidence that, in the opinion of the presiding officer, "would have probative value to a reasonable person." §6(D)(1). Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be sworn. See §§6(D)(2)(b), (3). Moreover, the accused and his civilian counsel may be denied access to evidence in the form of "protected information" (which includes classified information as well as "information protected by law or rule from unauthorized disclosure" and "information concerning other national security interests," §§6(B)(3), 6(D)(5)(a)(v)), so long as the presiding officer concludes that the evidence is "probative" under §6(D)(1) and that its admission without the accused's knowledge would not "result in the denial of a full and fair trial." §6(D)(5)(b).[43] Finally, a presiding officer's determi-

[42] The accused also may be excluded from the proceedings if he "engages in disruptive conduct." §5(K).

[43] As the District Court observed, this section apparently permits reception of testimony from a confidential informant in circumstances where

nation that evidence "would [not] have probative value to a reasonable person" may be overridden by a majority of the other commission members. § 6(D)(1).

Once all the evidence is in, the commission members (not including the presiding officer) must vote on the accused's guilt. A two-thirds vote will suffice for both a verdict of guilty and for imposition of any sentence not including death (the imposition of which requires a unanimous vote). § 6(F). Any appeal is taken to a three-member review panel composed of military officers and designated by the Secretary of Defense, only one member of which need have experience as a judge. § 6(H)(4). The review panel is directed to "disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission." *Ibid.* Once the panel makes its recommendation to the Secretary of Defense, the Secretary can either remand for further proceedings or forward the record to the President with his recommendation as to final disposition. § 6(H)(5). The President then, unless he has delegated the task to the Secretary, makes the "final decision." § 6(H)(6). He may change the commission's findings or sentence only in a manner favorable to the accused. *Ibid.*

B

Hamdan raises both general and particular objections to the procedures set forth in Commission Order No. 1. His general objection is that the procedures' admitted deviation from those governing courts-martial itself renders the commission illegal. Chief among his particular objections are that he may, under the Commission Order, be convicted

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"Hamdan will not be permitted to hear the testimony, see the witness's face, or learn his name. If the government has information developed by interrogation of witnesses in Afghanistan or elsewhere, it can offer such evidence in transcript form, or even as summaries of transcripts." 344 F. Supp. 2d 152, 168 (DC 2004).

based on evidence he has not seen or heard, and that any evidence admitted against him need not comply with the admissibility or relevance rules typically applicable in criminal trials and court-martial proceedings.

The Government objects to our consideration of any procedural challenge at this stage on the grounds that (1) the abstention doctrine espoused in *Councilman*, 420 U. S. 738, precludes preenforcement review of procedural rules, (2) Hamdan will be able to raise any such challenge following a "final decision" under the DTA, and (3) "there is . . . no basis to presume, before the trial has even commenced, that the trial will not be conducted in good faith and according to law." Brief for Respondents 45–46, nn. 20–21. The first of these contentions was disposed of in Part III, *supra*, and neither of the latter two is sound.

First, because Hamdan apparently is not subject to the death penalty (at least as matters now stand) and may receive a sentence shorter than 10 years' imprisonment, he has no automatic right to review of the commission's "final decision"[44] before a federal court under the DTA. See § 1005(e)(3), 119 Stat. 2743. Second, contrary to the Government's assertion, there *is* a "basis to presume" that the procedures employed during Hamdan's trial will violate the law: The procedures are described with particularity in Commission Order No. 1, and implementation of some of them has already occurred. One of Hamdan's complaints is that he will be, and *indeed already has been*, excluded from his own trial. See Reply Brief for Petitioner 12; App. to Pet. for Cert. 45a. Under these circumstances, review of the procedures in advance of a "final decision"—the timing of which is left entirely to the discretion of the President under the DTA—is appropriate. We turn, then, to consider the merits of Hamdan's procedural challenge.

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[44] Any decision of the commission is not "final" until the President renders it so. See Commission Order No. 1, § 6(H)(6).

C

In part because the difference between military commissions and courts-martial originally was a difference of jurisdiction alone, and in part to protect against abuse and ensure evenhandedness under the pressures of war, the procedures governing trials by military commission historically have been the same as those governing courts-martial. See, *e. g.*, 1 The War of the Rebellion 248 (2d series 1894) (General Order 1 issued during the Civil War required military commissions to "be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise"). Accounts of commentators from Winthrop through General Crowder—who drafted Article of War 15 and whose views have been deemed "authoritative" by this Court, *Madsen*, 343 U. S., at 353—confirm as much.[45] As recently as the Korean and Vietnam wars, during which use of military commissions was contemplated but never made, the principle of procedural parity was espoused as a background assumption. See Paust, Antiterrorism Military Commissions: Courting Illegality, 23 Mich. J. Int'l L. 1, 3–5 (2001–2002).

There is a glaring historical exception to this general rule. The procedures and evidentiary rules used to try General Yamashita near the end of World War II deviated in significant respects from those then governing courts-martial.

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[45] See Winthrop 835, and n. 81 ("military commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial"); *id.*, at 841–842; S. Rep. No. 130, 64th Cong., 1st Sess., 40 (1916) (testimony of Gen. Crowder) ("Both classes of courts have the same procedure"); see also, *e. g.*, H. Coppée, Field Manual of Courts-Martial 105 (1863) ("[Military] commissions are appointed by the same authorities as those which may order courts-martial. They are constituted in a manner similar to such courts, and their proceedings are conducted in exactly the same way, as to form, examination of witnesses, etc.").

See 327 U. S. 1. The force of that precedent, however, has been seriously undermined by post-World War II developments.

Yamashita, from late 1944 until September 1945, was Commanding General of the Fourteenth Army Group of the Imperial Japanese Army, which had exercised control over the Philippine Islands. On September 3, 1945, after American forces regained control of the Philippines, Yamashita surrendered. Three weeks later, he was charged with violations of the law of war. A few weeks after that, he was arraigned before a military commission convened in the Philippines. He pleaded not guilty, and his trial lasted for two months. On December 7, 1945, Yamashita was convicted and sentenced to hang. See *id.*, at 5; *id.*, at 31–34 (Murphy, J., dissenting). This Court upheld the denial of his petition for a writ of habeas corpus.

The procedures and rules of evidence employed during Yamashita's trial departed so far from those used in courts-martial that they generated an unusually long and vociferous critique from two Members of this Court. See *id.*, at 41–81 (Rutledge, J., joined by Murphy, J., dissenting).[46] Among the dissenters' primary concerns was that the commission had free rein to consider all evidence "which in the commission's opinion 'would be of assistance in proving or disproving the charge,' without any of the usual modes of authentication." *Id.*, at 49 (opinion of Rutledge, J.).

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[46] The dissenters' views are summarized in the following passage:

"It is outside our basic scheme to condemn men without giving reasonable opportunity for preparing defense; in capital or other serious crimes to convict on 'official documents . . . ; affidavits; . . . documents or translations thereof; diaries . . . , photographs, motion picture films, and . . . newspapers' or on hearsay, once, twice or thrice removed, more particularly when the documentary evidence or some of it is prepared *ex parte* by the prosecuting authority and includes not only opinion but conclusions of guilt. Nor in such cases do we deny the rights of confrontation of witnesses and cross-examination." *Yamashita*, 327 U. S., at 44 (footnotes omitted).

The majority, however, did not pass on the merits of Yamashita's procedural challenges because it concluded that his status disentitled him to any protection under the Articles of War (specifically, those set forth in Article 38, which would become Article 36 of the UCMJ) or the Geneva Convention of 1929, 47 Stat. 2021 (1929 Geneva Convention). The Court explained that Yamashita was neither a "person made subject to the Articles of War by Article 2" thereof, 327 U. S., at 20, nor a protected prisoner of war being tried for crimes committed during his detention, *id.*, at 21.

At least partially in response to subsequent criticism of General Yamashita's trial, the UCMJ's codification of the Articles of War after World War II expanded the category of persons subject thereto to include defendants in Yamashita's (and Hamdan's) position,[47] and the Third Geneva Convention of 1949 extended prisoner-of-war protections to individuals tried for crimes committed before their capture. See 3 Int'l Comm. of Red Cross,[48] Commentary: Geneva Convention Relative to the Treatment of Prisoners of War 413 (J. Pictet gen. ed. 1960) (hereinafter GCIII Commentary) (explaining

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[47] Article 2 of the UCMJ now reads:

"(a) The following persons are subject to [the UCMJ]:

. . . . . .

"(9) Prisoners of war in custody of the armed forces.

. . . . . .

"(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." 10 U. S. C. § 802(a).

Guantanamo Bay is such a leased area. See *Rasul* v. *Bush*, 542 U. S. 466, 471 (2004).

[48] The International Committee of the Red Cross is referred to by name in several provisions of the 1949 Geneva Conventions and is the body that drafted and published the official commentary to the Conventions. Though not binding law, the commentary is, as the parties recognize, relevant in interpreting the Conventions' provisions.

that Article 85, which extends the Convention's protections to "[p]risoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture," was adopted in response to judicial interpretations of the 1929 Geneva Convention, including this Court's decision in *Yamashita*). The most notorious exception to the principle of uniformity, then, has been stripped of its precedential value.

The uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that necessitates it. See Winthrop 835, n. 81. That understanding is reflected in Article 36 of the UCMJ, which provides:

> "(a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> "(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress." 70A Stat. 50.

Article 36 places two restrictions on the President's power to promulgate rules of procedure for courts-martial and military commissions alike. First, no procedural rule he adopts may be "contrary to or inconsistent with" the UCMJ—however practical it may seem. Second, the rules adopted must be "uniform insofar as practicable." That is, the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.

Hamdan argues that Commission Order No. 1 violates both of these restrictions; he maintains that the procedures described in the Commission Order are inconsistent with the UCMJ and that the Government has offered no explanation for their deviation from the procedures governing courts-martial, which are set forth in the Manual for Courts-Martial, United States (2005 ed.) (Manual for Courts-Martial). Among the inconsistencies Hamdan identifies is that between §6 of the Commission Order, which permits exclusion of the accused from proceedings and denial of his access to evidence in certain circumstances, and the UCMJ's requirement that "[a]ll . . . proceedings" other than votes and deliberations by courts-martial "shall be made a part of the record and shall be in the presence of the accused." 10 U. S. C. §839(c) (2000 ed., Supp. V). Hamdan also observes that the Commission Order dispenses with virtually all evidentiary rules applicable in courts-martial.

The Government has three responses. First, it argues, only 9 of the UCMJ's 158 Articles—the ones that expressly mention "military commissions"[49]—actually apply to commissions, and Commission Order No. 1 sets forth no pro-

[49] Aside from Articles 21 and 36, discussed at length in the text, the other seven Articles that expressly reference military commissions are: (1) 28 (requiring appointment of reporters and interpreters); (2) 47 (making it a crime to refuse to appear or testify "before a court-martial, military commission, court of inquiry, or any other military court or board"); (3) 48 (allowing a "court-martial, provost court, or military commission" to punish a person for contempt); (4) 49(d) (permitting admission into evidence of a "duly authenticated deposition taken upon reasonable notice to the other parties" *only* if "admissible under the rules of evidence" and *only* if the witness is otherwise unavailable); (5) 50 (permitting admission into evidence of records of courts of inquiry "if otherwise admissible under the rules of evidence," and if certain other requirements are met); (6) 104 (providing that a person accused of aiding the enemy may be sentenced to death or other punishment by military commission or court-martial); and (7) 106 (mandating the death penalty for spies convicted before military commission or court-martial).

cedure that is "contrary to or inconsistent with" those 9 provisions. Second, the Government contends, military commissions would be of no use if the President were hamstrung by those provisions of the UCMJ that govern courts-martial. Finally, the President's determination that "the danger to the safety of the United States and the nature of international terrorism" renders it impracticable "to apply in military commissions . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," November 13 Order § 1(f), is, in the Government's view, explanation enough for any deviation from court-martial procedures. See Brief for Respondents 43–47, and n. 22.

Hamdan has the better of this argument. Without reaching the question whether any provision of Commission Order No. 1 is strictly "contrary to or inconsistent with" other provisions of the UCMJ, we conclude that the "practicability" determination the President has made is insufficient to justify variances from the procedures governing courts-martial. Subsection (b) of Article 36 was added after World War II, and requires a different showing of impracticability from the one required by subsection (a). Subsection (a) requires that the rules the President promulgates for courts-martial, provost courts, and military commissions alike conform to those that govern procedures in *Article III courts*, "so far as *he considers* practicable." 10 U. S. C. § 836(a) (emphasis added). Subsection (b), by contrast, demands that the rules applied in courts-martial, provost courts, and military commissions—whether or not they conform with the Federal Rules of Evidence—be "uniform *insofar as practicable*." § 836(b) (emphasis added). Under the latter provision, then, the rules set forth in the Manual for Courts-Martial must apply to military commissions unless impracticable.[50]

[50] JUSTICE THOMAS relies on the legislative history of the UCMJ to argue that Congress' adoption of Article 36(b) in the wake of World War II was "motivated" solely by a desire for "uniformity across the separate branches of the armed services." *Post*, at 711. But even if Congress was

The President here has determined, pursuant to subsection (a), that it is impracticable to apply the rules and principles of law that govern "the trial of criminal cases in the United States district courts," § 836(a), to Hamdan's commission. We assume that complete deference is owed that determination. The President has not, however, made a similar official determination that it is impracticable to apply the rules for courts-martial.[51] And even if subsection (b)'s requirements may be satisfied without such an official determination, the requirements of that subsection are not satisfied here.

Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case. There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. Assuming, *arguendo*, that the reasons articulated in the President's Article 36(a) determination ought to be considered in evaluating the impracticability of applying court-martial rules, the only reason offered in support of that determination is the danger posed by international terrorism.[52]

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concerned with ensuring uniformity across service branches, that does not mean it did not also intend to codify the longstanding practice of procedural parity between courts-martial and other military tribunals. Indeed, the suggestion that Congress did *not* intend uniformity across tribunal types is belied by the textual proximity of subsection (a) (which requires that the rules governing criminal trials in federal district courts apply, absent the President's determination of impracticability, to courts-martial, provost courts, and *military commissions* alike) and subsection (b) (which imposes the uniformity requirement).

[51] We may assume that such a determination would be entitled to a measure of deference. For the reasons given by JUSTICE KENNEDY, see *post*, at 640 (opinion concurring in part), however, the level of deference accorded to a determination made under subsection (b) presumably would not be as high as that accorded to a determination under subsection (a).

[52] JUSTICE THOMAS looks not to the President's official Article 36(a) determination, but instead to press statements made by the Secretary of Defense and the Under Secretary of Defense for Policy. See *post*, at 712–713 (dissenting opinion). We have not heretofore, in evaluating the

Without for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial.

The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present. See 10 U. S. C. § 839(c) (2000 ed., Supp. V). Whether or not that departure technically is "contrary to or inconsistent with" the terms of the UCMJ, 10 U. S. C. § 836(a), the jettisoning of so basic a right cannot lightly be excused as "practicable."

Under the circumstances, then, the rules applicable in courts-martial must apply. Since it is undisputed that Commission Order No. 1 deviates in many significant respects from those rules, it necessarily violates Article 36(b).

The Government's objection that requiring compliance with the court-martial rules imposes an undue burden both ignores the plain meaning of Article 36(b) and misunderstands the purpose and the history of military commissions. The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. See Winthrop 831. Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections.

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legality of executive action, deferred to comments made by such officials to the media. Moreover, the only additional reason the comments provide—aside from the general danger posed by international terrorism—for departures from court-martial procedures is the need to protect classified information. As we explain in the text, and as JUSTICE KENNEDY elaborates in his separate opinion, the structural and procedural defects of Hamdan's commission extend far beyond rules preventing access to classified information.

That history explains why the military commission's procedures typically have been the ones used by courts-martial. That the jurisdiction of the two tribunals today may sometimes overlap, see *Madsen*, 343 U. S., at 354, does not detract from the force of this history;[53] Article 21 did not transform the military commission from a tribunal of true exigency into a more convenient adjudicatory tool. Article 36, confirming as much, strikes a careful balance between uniform procedure and the need to accommodate exigencies that may sometimes arise in a theater of war. That Article not having been complied with here, the rules specified for Hamdan's trial are illegal.[54]

D

The procedures adopted to try Hamdan also violate the Geneva Conventions. The Court of Appeals dismissed Hamdan's Geneva Convention challenge on three independent grounds: (1) the Geneva Conventions are not judicially enforceable; (2) Hamdan in any event is not entitled to their protections; and (3) even if he is entitled to their protections, *Councilman* abstention is appropriate. Judge Williams, concurring, rejected the second ground but agreed with the

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[53] JUSTICE THOMAS relies extensively on *Madsen* for the proposition that the President has free rein to set the procedures that govern military commissions. See *post*, at 706–707, 709, n. 16, 710, and 721. That reliance is misplaced. Not only did *Madsen* not involve a law-of-war military commission, but (1) the petitioner there did not challenge the procedures used to try her, (2) the UCMJ, with its new Article 36(b), did not become effective until May 31, 1951, *after* the petitioner's trial, see 343 U. S., at 345, n. 6, and (3) the procedures used to try the petitioner actually afforded *more* protection than those used in courts-martial, see *id.*, at 358–360; see also *id.*, at 358 ("[T]he Military Government Courts for Germany . . . have had a less military character than that of courts-martial").

[54] Prior to the enactment of Article 36(b), it may well have been the case that a deviation from the rules governing courts-martial would not have rendered the military commission "'*illegal.*'" *Post*, at 707, n. 15 (THOMAS, J., dissenting) (quoting Winthrop 841). Article 36(b), however, imposes a statutory command that must be heeded.

majority respecting the first and the last. As we explained in Part III, *supra*, the abstention rule applied in *Councilman*, 420 U. S. 738, is not applicable here.[55] And for the reasons that follow, we hold that neither of the other grounds the Court of Appeals gave for its decision is persuasive.

i

The Court of Appeals relied on *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), to hold that Hamdan could not invoke the Geneva Conventions to challenge the Government's plan to prosecute him in accordance with Commission Order No. 1. *Eisentrager* involved a challenge by 21 German nationals to their 1945 convictions for war crimes by a military tribunal convened in Nanking, China, and to their subsequent imprisonment in occupied Germany. The petitioners argued, *inter alia*, that the 1929 Geneva Convention rendered illegal some of the procedures employed during their trials, which they said deviated impermissibly from the procedures used by courts-martial to try American soldiers. See *id.*, at 789. We rejected that claim on the merits because the petitioners (unlike Hamdan here) had failed to identify any prejudicial disparity "between the Commission that tried [them] and those that would try an offending soldier of the American forces of like rank," and in any event could claim no protection, under the 1929 Geneva Convention, during trials for crimes that occurred before their confinement as prisoners of war. *Id.*, at 790.[56]

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[55] JUSTICE THOMAS makes the different argument that Hamdan's Geneva Convention challenge is not yet "ripe" because he has yet to be sentenced. See *post*, at 719–720. This is really just a species of the abstention argument we have already rejected. See Part III, *supra*. The text of the Geneva Conventions does not direct an accused to wait until sentence is imposed to challenge the legality of the tribunal that is to try him.

[56] As explained in Part VI–C, *supra*, that is no longer true under the 1949 Conventions.

Buried in a footnote of the opinion, however, is this curious statement suggesting that the Court lacked power even to consider the merits of the Geneva Convention argument:

> "We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention." *Id.*, at 789, n. 14.

The Court of Appeals, on the strength of this footnote, held that "the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court." 415 F. 3d, at 40.

Whatever else might be said about the *Eisentrager* footnote, it does not control this case. We may assume that "the obvious scheme" of the 1949 Conventions is identical in all relevant respects to that of the 1929 Geneva Convention,[57] and even that that scheme would, absent some other provision of law, preclude Hamdan's invocation of the Convention's provisions as an independent source of law binding the Gov-

[57] But see, *e. g.*, 4 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 21 (J. Pictet gen. ed. 1958) (hereinafter GCIV Commentary) (the 1949 Geneva Conventions were written "first and foremost to protect individuals, and not to serve State interests"); GCIII Commentary 91 ("It was not . . . until the Conventions of 1949 . . . that the existence of 'rights' conferred on prisoners of war was affirmed").

ernment's actions and furnishing petitioner with any enforceable right.[58] For, regardless of the nature of the rights conferred on Hamdan, cf. *United States* v. *Rauscher*, 119 U. S. 407 (1886), they are, as the Government does not dispute, part of the law of war. See *Hamdi*, 542 U. S., at 520–521 (plurality opinion). And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.

ii

For the Court of Appeals, acknowledgment of that condition was no bar to Hamdan's trial by commission. As an alternative to its holding that Hamdan could not invoke the Geneva Conventions at all, the Court of Appeals concluded that the Conventions did not in any event apply to the armed conflict during which Hamdan was captured. The court accepted the Executive's assertions that Hamdan was captured in connection with the United States' war with al Qaeda and that that war is distinct from the war with the Taliban in Afghanistan. It further reasoned that the war with al Qaeda evades the reach of the Geneva Conventions. See 415 F. 3d, at 41–42. We, like Judge Williams, disagree with the latter conclusion.

The conflict with al Qaeda is not, according to the Government, a conflict to which the full protections afforded detainees under the 1949 Geneva Conventions apply because Article 2 of those Conventions (which appears in all four Conventions) renders the full protections applicable only to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contract-

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[58] But see generally Brief for Louis Henkin et al. as *Amici Curiae;* 1 Int'l Comm. of Red Cross, Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 84 (1952) ("It should be possible in States which are parties to the Convention . . . for the rules of the Convention . . . to be evoked before an appropriate national court by the protected person who has suffered the violation"); GCIII Commentary 92; GCIV Commentary 79.

ing Parties." 6 U. S. T., at 3318.[59] Since Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not a "High Contracting Party"—*i. e.*, a signatory of the Conventions, the protections of those Conventions are not, it is argued, applicable to Hamdan.[60]

We need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories.[61] Article 3, often referred to as Common Article 3 because, like Article 2, it appears in all four Geneva Conventions, provides that in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party[62] to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons taking no active part in the hostilities, including

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[59] For convenience's sake, we use citations to the Third Geneva Convention only.

[60] The President has stated that the conflict with the Taliban is a conflict to which the Geneva Conventions apply. See White House Memorandum, Humane Treatment of Taliban and al Qaeda Detainees 2 (Feb. 7, 2002), available at http://www.justicescholars.org/pegc/archive/White_House/bush_memo_20020207_ed.pdf.

[61] Hamdan observes that Article 5 of the Third Geneva Convention requires that if there be "any doubt" whether he is entitled to prisoner-of-war protections, he must be afforded those protections until his status is determined by a "competent tribunal." 6 U. S. T., at 3324. See also Headquarters Depts. of Army, Navy, Air Force, and Marine Corps, Army Regulation 190–8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997), App. 116. Because we hold that Hamdan may not, in any event, be tried by the military commission the President has convened pursuant to the November 13 Order and Commission Order No. 1, the question whether his potential status as a prisoner of war independently renders illegal his trial by military commission may be reserved.

[62] The term "Party" here has the broadest possible meaning; a Party need neither be a signatory of the Convention nor "even represent a legal entity capable of undertaking international obligations." GCIII Commentary 37.

members of armed forces who have laid down their arms and those placed *hors de combat* by . . . detention." *Ibid.* One such provision prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.*, at 3320.

The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being "'international in scope,'" does not qualify as a "'conflict not of an international character.'" 415 F. 3d, at 41. That reasoning is erroneous. The term "conflict not of an international character" is used here in contradistinction to a conflict between nations. So much is demonstrated by the "fundamental logic [of] the Convention's provisions on its application." *Id.*, at 44 (Williams, J., concurring). Common Article 2 provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." 6 U. S. T., at 3318 (Art. 2, ¶ 1). High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-à-vis one another even if one party to the conflict is a nonsignatory "Power," and must so abide vis-à-vis the nonsignatory if "the latter accepts and applies" those terms. *Ibid.* (Art. 2, ¶ 3). Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning. See, *e. g.*, J. Bentham, Introduction to the Principles of Morals and Legislation 6, 296 (J.

Burns & H. Hart eds. 1970) (using the term "international law" as a "new though not inexpressive appellation" meaning "betwixt nation and nation"; defining "international" to include "mutual transactions between sovereigns as such"); Int'l Comm. of Red Cross, Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949, p. 1351 (1987) ("[A] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other").

Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of "conflict not of an international character," *i. e.*, a civil war, see GCIII Commentary 36–37, the commentaries also make clear "that the scope of application of the Article must be as wide as possible," *id.*, at 36.[63] In fact, limiting language that would have rendered Common Article 3 applicable "especially [to] cases of civil war, colonial conflicts, or wars of religion" was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations. See *id.*, at 42–43.

iii

Common Article 3, then, is applicable here and, as indicated above, requires that Hamdan be tried by a "regularly

[63] See also *id.*, at 35 (Common Article 3 "has the merit of being simple and clear. . . . Its observance does not depend upon preliminary discussions on the nature of the conflict"); GCIV Commentary 51 ("[N]obody in enemy hands can be outside the law"); U. S. Army Judge Advocate General's Legal Center and School, Dept. of the Army, Law of War Workshop Deskbook 228 (June 2000) (reprint 2004) (Common Article 3 "serves as a 'minimum yardstick of protection' in all conflicts, not just internal armed conflicts" (quoting *Nicaragua* v. *United States*, 1986 I. C. J. 14, ¶218, 25 I. L. M. 1023)); *Prosecutor* v. *Tadić*, Case No. IT–94–1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶102 (ICTY App. Chamber, Oct. 2, 1995) (stating that "the character of the conflict is irrelevant" in deciding whether Common Article 3 applies).

constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." 6 U. S. T., at 3320 (Art. 3, ¶ 1*(d)*). While the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning. The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines "'regularly constituted'" tribunals to include "ordinary military courts" and "definitely exclud[e] all special tribunals." GCIV Commentary 340 (defining the term "properly constituted" in Article 66, which the commentary treats as identical to "regularly constituted");[64] see also *Yamashita*, 327 U. S., at 44 (Rutledge, J., dissenting) (describing military commission as a court "specially constituted for the particular trial"). And one of the Red Cross' own treatises defines "regularly constituted court" as used in Common Article 3 to mean "established and organised in accordance with the laws and procedures already in force in a country." Int'l Comm. of Red Cross, 1 Customary Int'l Humanitarian Law 355 (2005); see also GCIV Commentary 340 (observing that "ordinary military courts" will "be set up in accordance with the recognized principles governing the administration of justice").

The Government offers only a cursory defense of Hamdan's military commission in light of Common Article 3. See Brief for Respondents 49–50. As JUSTICE KENNEDY explains, that defense fails because "[t]he regular military courts in our system are the courts-martial established by congressional statutes." *Post*, at 644 (opinion concurring in part). At a minimum, a military commission "can be 'regularly constituted' by the standards of our military justice sys-

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[64] The commentary's assumption that the terms "properly constituted" and "regularly constituted" are interchangeable is beyond reproach; the French version of Article 66, which is equally authoritative, uses the term "régulièrement constitués" in place of "properly constituted." 6 U. S. T., at 3559.

tem only if some practical need explains deviations from court-martial practice." *Post*, at 645. As we have explained, see Part VI–C, *supra*, no such need has been demonstrated here.[65]

iv

Inextricably intertwined with the question of regular constitution is the evaluation of the procedures governing the tribunal and whether they afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." 6 U. S. T., at 3320 (Art. 3, ¶ 1(*d*)). Like the phrase "regularly constituted court," this phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government "regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled." Taft, The Law of Armed Conflict After 9/11: Some Salient Features, 28 Yale J. Int'l L. 319, 322 (2003). Among the rights set forth in Article 75 is the "right to be tried in [one's] presence." Protocol I, Art. 75(4)(e).[66]

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[65] Further evidence of this tribunal's irregular constitution is the fact that its rules and procedures are subject to change midtrial, at the whim of the Executive. See Commission Order No. 1, § 11 (providing that the Secretary of Defense may change the governing rules "from time to time").

[66] Other international instruments to which the United States is a signatory include the same basic protections set forth in Article 75. See, *e. g.*, International Covenant on Civil and Political Rights, Art. 14, ¶ 3(*d*), Mar. 23, 1976, 999 U. N. T. S. 171 (setting forth the right of an accused "[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing"). Following World War II, several defendants were tried and convicted by military commission for violations

We agree with JUSTICE KENNEDY that the procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any "evident practical need," *post*, at 647, and for that reason, at least, fail to afford the requisite guarantees. See *post*, at 646–653. We add only that, as noted in Part VI–A, *supra*, various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him. See §§ 6(B)(3), (D).[67] That the

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of the law of war in their failure to afford captives fair trials before imposition and execution of sentence. In two such trials, the prosecutors argued that the defendants' failure to apprise accused individuals of all evidence against them constituted violations of the law of war. See 5 U. N. War Crimes Commission, Law Reports of Trials of War Criminals 25, 30 (1948) (reprint 1997) (trial of Sergeant-Major Shigeru Ohashi), 66, 75 (trial of General Tanaka Hisakasu).

[67] The Government offers no defense of these procedures other than to observe that the defendant may not be barred from access to evidence if such action would deprive him of a "full and fair trial." Commission Order No. 1, § 6(D)(5)(b). But the Government suggests no circumstances in which it would be "fair" to convict the accused based on evidence he has not seen or heard. Cf. *Crawford* v. *Washington*, 541 U. S. 36, 49 (2004) ("'It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine'" (quoting *State* v. *Webb*, 2 N. C. 103, 104 (Super. L. & Eq. 1794) *(per curiam)*); *Diaz* v. *United States*, 223 U. S. 442, 455 (1912) (describing the right to be present as "scarcely less important to the accused than the right of trial itself"); *Lewis* v. *United States*, 146 U. S. 370, 372 (1892) (exclusion of defendant from part of proceedings is "contrary to the dictates of humanity" (internal quotation marks omitted)); *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 170, n. 17, 171 (1951) (Frankfurter, J., concurring) ("The plea that evidence of guilt must be secret is abhorrent to free men" (internal quotation marks omitted)). More fundamentally, the legality of a tribunal under Common Article 3 cannot be established by bare assurances that, whatever the character of the court or the procedures it follows, individual adjudicators will act fairly.

Government has a compelling interest in denying Hamdan access to certain sensitive information is not doubted. Cf. *post*, at 723–724 (THOMAS, J., dissenting). But, at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him.

V

Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements.

VII

We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge—viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the rule of law that prevails in this jurisdiction.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

JUSTICE BREYER, with whom JUSTICE KENNEDY, JUSTICE SOUTER, and JUSTICE GINSBURG join, concurring.

The dissenters say that today's decision would "sorely hamper the President's ability to confront and defeat a new and deadly enemy." *Post*, at 705 (opinion of THOMAS, J.). They suggest that it undermines our Nation's ability to "preven[t] future attacks" of the grievous sort that we have already suffered. *Post*, at 724. That claim leads me to state briefly what I believe the majority sets forth both explicitly and implicitly at greater length. The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check." Cf. *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 536 (2004) (plurality opinion). Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.

Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.

JUSTICE KENNEDY, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join as to Parts I and II, concurring in part.

Military Commission Order No. 1, which governs the military commission established to try petitioner Salim Hamdan for war crimes, exceeds limits that certain statutes, duly enacted by Congress, have placed on the President's authority to convene military courts. This is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an inde-

pendent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority. Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.

These principles seem vindicated here, for a case that may be of extraordinary importance is resolved by ordinary rules. The rules of most relevance here are those pertaining to the authority of Congress and the interpretation of its enactments.

It seems appropriate to recite these rather fundamental points because the Court refers, as it should in its exposition of the case, to the requirement of the Geneva Conventions of 1949 that military tribunals be "regularly constituted," *ante*, at 632—a requirement that controls here, if for no other reason, because Congress requires that military commissions like the ones at issue conform to the "law of war," 10 U. S. C. § 821. Whatever the substance and content of the term "regularly constituted" as interpreted in this and any later cases, there seems little doubt that it relies upon the importance of standards deliberated upon and chosen in advance of crisis, under a system where the single power of the Executive is checked by other constitutional mechanisms. All of which returns us to the point of beginning—that domestic statutes control this case. If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.

I join the Court's opinion, save Parts V and VI–D–iv. To state my reasons for this reservation, and to show my agreement with the remainder of the Court's analysis by identifying particular deficiencies in the military commissions at issue, this separate opinion seems appropriate.

I

Trial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review. Cf. *Loving* v. *United States*, 517 U. S. 748, 756–758, 760 (1996). Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid. It is imperative, then, that when military tribunals are established, full and proper authority exists for the Presidential directive.

The proper framework for assessing whether executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.*, at 635. "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.*, at 637. And "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Ibid.*

In this case, as the Court observes, the President has acted in a field with a history of congressional participation and regulation. *Ante*, at 593, 619–620. In the Uniform Code

of Military Justice (UCMJ), 10 U. S. C. §801 *et seq.*, which Congress enacted, building on earlier statutes, in 1950, see Act of May 5, 1950, ch. 169, 64 Stat. 107, and later amended, see, *e. g.*, Military Justice Act of 1968, 82 Stat. 1335, Congress has set forth governing principles for military courts. The UCMJ as a whole establishes an intricate system of military justice. It authorizes courts-martial in various forms, 10 U. S. C. §§816–820 (2000 ed. and Supp. III); it regulates the organization and procedure of those courts, *e. g.*, §§822–835, 851–854; it defines offenses, §§877–934, and rights for the accused, *e. g.*, §§827(b)–(c), 831, 844, 846, 855 (2000 ed.); and it provides mechanisms for appellate review, §§859–876b (2000 ed. and Supp. III). As explained below, the statute further recognizes that special military commissions may be convened to try war crimes. See *infra*, at 641; §821 (2000 ed.). While these laws provide authority for certain forms of military courts, they also impose limitations, at least two of which control this case. If the President has exceeded these limits, this becomes a case of conflict between Presidential and congressional action—a case within Justice Jackson's third category, not the second or first.

One limit on the President's authority is contained in Article 36 of the UCMJ. That section provides:

> "(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> "(b) All rules and regulations made under this article shall be uniform insofar as practicable." 10 U. S. C. §836 (2000 ed.).

In this provision the statute allows the President to implement and build on the UCMJ's framework by adopting procedural regulations, subject to three requirements: (1) Procedures for military courts must conform to district-court rules insofar as the President "considers practicable"; (2) the procedures may not be contrary to or inconsistent with the provisions of the UCMJ; and (3) "insofar as practicable" all rules and regulations under § 836 must be uniform, a requirement, as the Court points out, that indicates the rules must be the same for military commissions as for courts-martial unless such uniformity is impracticable, *ante*, at 620, 622, and n. 50.

As the Court further instructs, even assuming the first and second requirements of § 836 are satisfied here—a matter of some dispute, see *ante*, at 620–622—the third requires us to compare the military-commission procedures with those for courts-martial and determine, to the extent there are deviations, whether greater uniformity would be practicable. *Ante*, at 623–625. Although we can assume the President's practicability judgments are entitled to some deference, the Court observes that Congress' choice of language in the uniformity provision of 10 U. S. C. § 836(b) contrasts with the language of § 836(a). This difference suggests, at the least, a lower degree of deference for § 836(b) determinations. *Ante*, at 623. The rules for military courts may depart from federal-court rules whenever the President "considers" conformity impracticable, § 836(a); but the statute requires procedural uniformity across different military courts "insofar as [uniformity is] practicable," § 836(b), not insofar as the President considers it to be so. The Court is right to conclude this is of relevance to our decision. Further, as the Court is also correct to conclude, *ante*, at 623–624, the term "practicable" cannot be construed to permit deviations based on mere convenience or expedience. "Practicable" means "feasible," that is, "possible to practice or perform" or "capable of being put into practice, done, or accomplished." Web-

ster's Third New International Dictionary 1780 (1961). Congress' chosen language, then, is best understood to allow the selection of procedures based on logistical constraints, the accommodation of witnesses, the security of the proceedings, and the like. Insofar as the "[p]retrial, trial, and post-trial procedures" for the military commissions at issue deviate from court-martial practice, the deviations must be explained by some such practical need.

In addition to § 836, a second UCMJ provision, 10 U. S. C. § 821, requires us to compare the commissions at issue to courts-martial. This provision states:

> "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."

In § 821 Congress has addressed the possibility that special military commissions—criminal courts other than courts-martial—may at times be convened. At the same time, however, the President's authority to convene military commissions is limited: It extends only to "offenders or offenses" that "by statute or by the law of war may be tried by" such military commissions. *Ibid.;* see also *ante,* at 593. The Government does not claim to base the charges against Hamdan on a statute; instead it invokes the law of war. That law, as the Court explained in *Ex parte Quirin,* 317 U. S. 1 (1942), derives from "rules and precepts of the law of nations"; it is the body of international law governing armed conflict. *Id.,* at 28. If the military commission at issue is illegal under the law of war, then an offender cannot be tried "by the law of war" before that commission.

The Court is correct to concentrate on one provision of the law of war that is applicable to our Nation's armed conflict

with al Qaeda in Afghanistan and, as a result, to the use of a military commission to try Hamdan. *Ante*, at 629–633; see also 415 F. 3d 33, 44 (CADC 2005) (Williams, J., concurring). That provision is Common Article 3 of the four Geneva Conventions of 1949. It prohibits, as relevant here, "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." See, *e. g.*, Article 3 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3318, T. I. A. S. No. 3364. The provision is part of a treaty the United States has ratified and thus accepted as binding law. See *id.*, at 3316. By Act of Congress, moreover, violations of Common Article 3 are considered "war crimes," punishable as federal offenses, when committed by or against United States nationals and military personnel. See 18 U. S. C. §2441. There should be no doubt, then, that Common Article 3 is part of the law of war as that term is used in §821.

The dissent by JUSTICE THOMAS argues that Common Article 3 nonetheless is irrelevant to this case because in *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), it was said to be the "obvious scheme" of the 1929 Geneva Convention that "[r]ights of alien enemies are vindicated under it only through protests and intervention of protecting powers," *i. e.*, signatory states, *id.*, at 789, n. 14. As the Court explains, *ante*, at 626–628, this language from *Eisentrager* is not controlling here. Even assuming the *Eisentrager* analysis has some bearing upon the analysis of the broader 1949 Conventions and that, in consequence, rights are vindicated "under [those Conventions]" only through protests and intervention, 339 U. S., at 789, n. 14, Common Article 3 is nonetheless relevant to the question of authorization under §821. Common Article 3 is part of the law of war that Congress has directed the President to follow in establishing military

commissions. *Ante*, at 629–630. Consistent with that view, the *Eisentrager* Court itself considered on the merits claims that "procedural irregularities" under the 1929 Convention "deprive[d] the Military Commission of jurisdiction." 339 U. S., at 789, 790.

In another military-commission case, *In re Yamashita*, 327 U. S. 1 (1946), the Court likewise considered on the merits—without any caveat about remedies under the Convention—a claim that an alleged violation of the 1929 Convention "establish[ed] want of authority in the commission to proceed with the trial." *Id.*, at 23, 24. That is the precise inquiry we are asked to perform here.

Assuming the President has authority to establish a special military commission to try Hamdan, the commission must satisfy Common Article 3's requirement of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," 6 U. S. T., at 3320. The terms of this general standard are yet to be elaborated and further defined, but Congress has required compliance with it by referring to the "law of war" in § 821. The Court correctly concludes that the military commission here does not comply with this provision.

Common Article 3's standard of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," *ibid.*, supports, at the least, a uniformity principle similar to that codified in § 836(b). The concept of a "regularly constituted court" providing "indispensable" judicial guarantees requires consideration of the system of justice under which the commission is established, though no doubt certain minimum standards are applicable. See *ante*, at 632–633; 1 Int'l Comm. of Red Cross, 1 Customary Int'l Humanitarian Law 355 (2005) (explaining that courts are "regularly constituted" under Common Article 3 if they are "established and organised in accordance with the laws and procedures already in force in a country").

The regular military courts in our system are the courts-martial established by congressional statutes. Acts of Congress confer on those courts the jurisdiction to try "any person" subject to war crimes prosecution. 10 U. S. C. §818. As the Court explains, moreover, while special military commissions have been convened in previous armed conflicts—a practice recognized in §821—those military commissions generally have adopted the structure and procedure of courts-martial. See, *e. g.*, 1 The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies 248 (2d series 1894) (Civil War general order requiring that military commissions "be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise"); W. Winthrop, Military Law and Precedents 835, n. 81 (rev. 2d ed. 1920) ("[M]ilitary commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial"); 1 U. N. War Crimes Commission, Law Reports of Trials of War Criminals 116–117 (1947) (reprint 1997) (hereinafter Law Reports) (discussing post-World War II regulations requiring that military commissions "hav[e] regard for" rules of procedure and evidence applicable in general courts-martial); see also *ante*, at 617–620; *post*, at 707, n. 15 (THOMAS, J., dissenting). Today, moreover, §836(b)—which took effect after the military trials in the World War II cases invoked by the dissent, see *Madsen* v. *Kinsella*, 343 U. S. 341, 344–345, and n. 6 (1952); *Yamashita*, *supra*, at 5; *Quirin*, 317 U. S., at 23—codifies this presumption of uniformity at least as to "[p]retrial, trial, and post-trial procedures." Absent more concrete statutory guidance, this historical and statutory background—which suggests that some practical need must justify deviations from the court-martial model—informs the understanding of which military courts are "regularly constituted" under United States law.

In addition, whether or not the possibility, contemplated by the regulations here, of midtrial procedural changes could by itself render a military commission impermissibly irregular, *ante*, at 633, n. 65; see also Military Commission Order No. 1, § 11 (Aug. 31, 2005), App. to Brief for Petitioner 46a–72a (hereinafter MCO), an acceptable degree of independence from the Executive is necessary to render a commission "regularly constituted" by the standards of our Nation's system of justice. And any suggestion of executive power to interfere with an ongoing judicial process raises concerns about the proceedings' fairness. Again, however, courts-martial provide the relevant benchmark. Subject to constitutional limitations, see *Ex parte Milligan*, 4 Wall. 2 (1866), Congress has the power and responsibility to determine the necessity for military courts, and to provide the jurisdiction and procedures applicable to them. The guidance Congress has provided with respect to courts-martial indicates the level of independence and procedural rigor that Congress has deemed necessary, at least as a general matter, in the military context.

At a minimum a military commission like the one at issue—a commission specially convened by the President to try specific persons without express congressional authorization—can be "regularly constituted" by the standards of our military justice system only if some practical need explains deviations from court-martial practice. In this regard the standard of Common Article 3, applied here in conformity with § 821, parallels the practicability standard of § 836(b). Section 836, however, is limited by its terms to matters properly characterized as procedural—that is, "[p]retrial, trial, and post-trial procedures"—while Common Article 3 permits broader consideration of matters of structure, organization, and mechanisms to promote the tribunal's insulation from command influence. Thus the combined effect of the two statutes discussed here—§§ 836 and 821—is that considerations of practicability must support departures from court-

martial practice. Relevant concerns, as noted earlier, relate to logistical constraints, accommodation of witnesses, security of the proceedings, and the like, not mere expedience or convenience. This determination, of course, must be made with due regard for the constitutional principle that congressional statutes can be controlling, including the congressional direction that the law of war has a bearing on the determination.

These principles provide the framework for an analysis of the specific military commission at issue here.

II

In assessing the validity of Hamdan's military commission the precise circumstances of this case bear emphasis. The allegations against Hamdan are undoubtedly serious. Captured in Afghanistan during our Nation's armed conflict with the Taliban and al Qaeda—a conflict that continues as we speak—Hamdan stands accused of overt acts in furtherance of a conspiracy to commit terrorism: delivering weapons and ammunition to al Qaeda, acquiring trucks for use by Usama bin Laden's bodyguards, providing security services to bin Laden, and receiving weapons training at a terrorist camp. App. to Pet. for Cert. 65a–67a. Nevertheless, the circumstances of Hamdan's trial present no exigency requiring special speed or precluding careful consideration of evidence. For roughly four years, Hamdan has been detained at a permanent United States military base in Guantanamo Bay, Cuba. And regardless of the outcome of the criminal proceedings at issue, the Government claims authority to continue to detain him based on his status as an enemy combatant.

Against this background, the Court is correct to conclude that the military commission the President has convened to try Hamdan is unauthorized. *Ante*, at 625, 631–633, 635. The following analysis, which expands on the Court's discussion, explains my reasons for reaching this conclusion.

To begin with, the structure and composition of the military commission deviate from conventional court-martial standards. Although these deviations raise questions about the fairness of the trial, no evident practical need explains them.

Under the UCMJ, courts-martial are organized by a "convening authority"—either a commanding officer, the Secretary of Defense, the Secretary concerned, or the President. 10 U. S. C. §§ 822–824 (2000 ed. and Supp. III). The convening authority refers charges for trial, Manual for Courts-Martial, United States, Rule for Courts-Martial 401 (2005 ed.) (hereinafter R. C. M.), and selects the court-martial members who vote on the guilt or innocence of the accused and determine the sentence, 10 U. S. C. §§ 825(d)(2), 851–852 (2000 ed.); R. C. M. 503(a). Paralleling this structure, under MCO No. 1 an "'Appointing Authority'"—either the Secretary of Defense or the Secretary's "designee"—establishes commissions subject to the order, MCO No. 1, § 2, approves and refers charges to be tried by those commissions, § 4(B)(2)(a), and appoints commission members who vote on the conviction and sentence, §§ 4(A) (1)–(3). In addition the Appointing Authority determines the number of commission members (at least three), oversees the chief prosecutor, provides "investigative or other resources" to the defense insofar as he or she "deems necessary for a full and fair trial," approves or rejects plea agreements, approves or disapproves communications with news media by prosecution or defense counsel (a function shared by the General Counsel of the Department of Defense), and issues supplementary commission regulations (subject to approval by the General Counsel of the Department of Defense, unless the Appointing Authority is the Secretary of Defense). See MCO No. 1, §§ 4(A)(2), 5(H), 6(A)(4), 7(A); Military Commission Instruction No. 3, § 5(C) (July 15, 2005) (hereinafter MCI), available at www.defenselink.mil/news/Aug2005/d20050811MCI3.pdf; MCI No. 4, § 5(C) (Sept. 16, 2005), available at www.

defenselink.mil/news/Oct2005/d20051003MCI4.pdf; MCI No. 6, § 3(B)(3) (Apr. 15, 2004), available at www.defenselink.mil/news/Apr2004/d20040420ins6.pdf (all Internet materials as visited June 27, 2006, and available in Clerk of Court's case file).

Against the background of these significant powers for the Appointing Authority, which in certain respects at least conform to ordinary court-martial standards, the regulations governing the commissions at issue make several noteworthy departures. At a general court-martial—the only type authorized to impose penalties of more than one year's incarceration or to adjudicate offenses against the law of war, R. C. M. 201(f); 10 U. S. C. §§ 818–820 (2000 ed. and Supp. III)—the presiding officer who rules on legal issues must be a military judge. R. C. M. 501(a)(1), 801(a)(4)–(5); 10 U. S. C. § 816(1) (2000 ed., Supp. III); see also R. C. M. 201(f)(2)(B)(ii) (likewise requiring a military judge for certain other courts-martial); 10 U. S. C. § 819 (2000 ed. and Supp. III) (same). A military judge is an officer who is a member of a state or federal bar and has been specially certified for judicial duties by the Judge Advocate General for the officer's Armed Service. R. C. M. 502(c); 10 U. S. C. § 826(b). To protect their independence, military judges at general courts-martial are "assigned and directly responsible to the Judge Advocate General or the Judge Advocate General's designee." R. C. M. 502(c). They must be detailed to the court, in accordance with applicable regulations, "by a person assigned as a military judge and directly responsible to the Judge Advocate General or the Judge Advocate General's designee." R. C. M. 503(b); see also 10 U. S. C. § 826(c); see generally *Weiss* v. *United States*, 510 U. S. 163, 179–181 (1994) (discussing provisions that "insulat[e] military judges from the effects of command influence" and thus "preserve judicial impartiality"). Here, by contrast, the Appointing Authority selects the presiding officer, MCO No. 1, §§ 4(A)(1), (A)(4);

and that officer need only be a judge advocate, that is, a military lawyer, § 4(A)(4).

The Appointing Authority, moreover, exercises supervisory powers that continue during trial. Any interlocutory question "the disposition of which would effect a termination of proceedings with respect to a charge" is subject to decision not by the presiding officer, but by the Appointing Authority. § 4(A)(5)(e) (stating that the presiding officer "shall certify" such questions to the Appointing Authority). Other interlocutory questions may be certified to the Appointing Authority as the presiding officer "deems appropriate." *Ibid.* While in some circumstances the Government may appeal certain rulings at a court-martial—including "an order or ruling that terminates the proceedings with respect to a charge or specification," R. C. M. 908(a); see also 10 U. S. C. § 862(a)—the appeals go to a body called the Court of Criminal Appeals, not to the convening authority. R. C. M. 908; 10 U. S. C. § 862(b); see also R. C. M. 1107 (requiring the convening authority to approve or disapprove the findings and sentence of a court-martial but providing for such action only after entry of sentence and restricting actions that increase penalties); 10 U. S. C. § 860 (same); cf. § 837(a) (barring command influence on court-martial actions). The Court of Criminal Appeals functions as the military's intermediate appeals court; it is established by the Judge Advocate General for each Armed Service and composed of appellate military judges. R. C. M. 1203; 10 U. S. C. § 866. This is another means in which, by structure and tradition, the court-martial process is insulated from those who have an interest in the outcome of the proceedings.

Finally, in addition to these powers with respect to the presiding officer, the Appointing Authority has greater flexibility in appointing commission members. While a general court-martial requires, absent a contrary election by the accused, at least five members, R. C. M. 501(a)(1); 10 U. S. C. § 816(1) (2000 ed. and Supp. III), the Appointing Authority

here is free, as noted earlier, to select as few as three. MCO No. 1, § 4(A)(2). This difference may affect the deliberative process and the prosecution's burden of persuasion.

As compared to the role of the convening authority in a court-martial, the greater powers of the Appointing Authority here—including even the resolution of dispositive issues in the middle of the trial—raise concerns that the commission's decisionmaking may not be neutral. If the differences are supported by some practical need beyond the goal of constant and ongoing supervision, that need is neither apparent from the record nor established by the Government's submissions.

It is no answer that, at the end of the day, the Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739, affords military-commission defendants the opportunity for judicial review in federal court. As the Court is correct to observe, the scope of that review is limited, DTA § 1005(e)(3)(D), *id.*, at 2743; see also *ante*, at 573–574, and the review is not automatic if the defendant's sentence is under 10 years, § 1005(e)(3)(B), 119 Stat. 2743. Also, provisions for review of legal issues after trial cannot correct for structural defects, such as the role of the Appointing Authority, that can cast doubt on the factfinding process and the presiding judge's exercise of discretion during trial. Before military-commission defendants may obtain judicial review, furthermore, they must navigate a military review process that again raises fairness concerns. At the outset, the Appointing Authority (unless the Appointing Authority is the Secretary of Defense) performs an "administrative review" of undefined scope, ordering any "supplementary proceedings" deemed necessary. MCO No. 1, § 6(H)(3). After that the case is referred to a three-member Review Panel composed of officers selected by the Secretary of Defense. § 6(H)(4); MCI No. 9, § 4(B) (Oct. 11, 2005), available at www.defenselink.mil/news/Oct2005/d20051014MCI9.pdf. Though the Review Panel may return the case for further

proceedings only if a majority "form[s] a definite and firm conviction that a material error of law occurred," MCO No. 1, § 6(H)(4); MCI No. 9, § 4(C)(1)(a), only one member must have "experience as a judge," MCO No. 1, § 6(H)(4); nothing in the regulations requires that other panel members have legal training. By comparison to the review of court-martial judgments performed by such independent bodies as the Judge Advocate General, the Court of Criminal Appeals, and the Court of Appeals for the Armed Forces, 10 U. S. C. §§ 862, 864, 866, 867, 869, the review process here lacks structural protections designed to help ensure impartiality.

These structural differences between the military commissions and courts-martial—the concentration of functions, including legal decisionmaking, in a single executive official; the less rigorous standards for composition of the tribunal; and the creation of special review procedures in place of institutions created and regulated by Congress—remove safeguards that are important to the fairness of the proceedings and the independence of the court. Congress has prescribed these guarantees for courts-martial; and no evident practical need explains the departures here. For these reasons the commission cannot be considered regularly constituted under United States law and thus does not satisfy Congress' requirement that military commissions conform to the law of war.

Apart from these structural issues, moreover, the basic procedures for the commissions deviate from procedures for courts-martial, in violation of § 836(b). As the Court explains, *ante*, at 614–615, 623, the MCO abandons the detailed Military Rules of Evidence, which are modeled on the Federal Rules of Evidence in conformity with § 836(a)'s requirement of presumptive compliance with district-court rules.

Instead, the order imposes just one evidentiary rule: "Evidence shall be admitted if . . . the evidence would have probative value to a reasonable person," MCO No. 1, § 6(D)(1). Although it is true some military commissions applied

an amorphous evidence standard in the past, see, *e. g.*, 1 Law Reports 117–118 (discussing World War II military-commission orders); Exec. Order No. 9185, 7 Fed. Reg. 5103 (1942) (order convening military commission to try Nazi saboteurs), the evidentiary rules for those commissions were adopted before Congress enacted the uniformity requirement of 10 U. S. C. § 836(b) as part of the UCMJ, see Act of May 5, 1950, ch. 169, 64 Stat. 107, 120, 149. And while some flexibility may be necessary to permit trial of battlefield captives like Hamdan, military statutes and rules already provide for introduction of deposition testimony for absent witnesses, 10 U. S. C. § 849(d); R. C. M. 702, and use of classified information, Military Rule Evid. 505. Indeed, the deposition-testimony provision specifically mentions military commissions and thus is one of the provisions the Government concedes must be followed by the commission at issue. See *ante*, at 621, and n. 49. That provision authorizes admission of deposition testimony only if the witness is absent for specified reasons, § 849(d)—a requirement that makes no sense if military commissions may consider all probative evidence. Whether or not this conflict renders the rules at issue "contrary to or inconsistent with" the UCMJ under § 836(a), it creates a uniformity problem under § 836(b).

The rule here could permit admission of multiple hearsay and other forms of evidence generally prohibited on grounds of unreliability. Indeed, the commission regulations specifically contemplate admission of unsworn written statements, MCO No. 1, § 6(D)(3); and they make no provision for exclusion of coerced declarations save those "established to have been made as a result of torture," MCI No. 10, § 3(A) (Mar. 24, 2006), available at www.defenselink.mil/news/Mar2006/d20060327MCI10.pdf; cf. Military Rule Evid. 304(c)(3) (generally barring use of statements obtained "through the use of coercion, unlawful influence, or unlawful inducement"); 10 U. S. C. § 831(d) (same). Besides, even if

evidence is deemed nonprobative by the presiding officer at Hamdan's trial, the military-commission members still may view it. In another departure from court-martial practice the military-commission members may object to the presiding officer's evidence rulings and determine themselves, by majority vote, whether to admit the evidence. MCO No. 1, § 6(D)(1); cf. R. C. M. 801(a)(4), (e)(1) (providing that the military judge at a court-martial determines all questions of law).

As the Court explains, the Government has made no demonstration of practical need for these special rules and procedures, either in this particular case or as to the military commissions in general, *ante*, at 622–624; nor is any such need self-evident. For all the Government's regulations and submissions reveal, it would be feasible for most, if not all, of the conventional military evidence rules and procedures to be followed.

In sum, as presently structured, Hamdan's military commission exceeds the bounds Congress has placed on the President's authority in Articles 36 and 21 of the UCMJ, 10 U. S. C. §§ 836, 821. Because Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws. At this time, however, we must apply the standards Congress has provided. By those standards the military commission is deficient.

III

In light of the conclusion that the military commission here is unauthorized under the UCMJ, I see no need to consider several further issues addressed in the plurality opinion by JUSTICE STEVENS and the dissent by JUSTICE THOMAS.

First, I would not decide whether Common Article 3's standard—a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," 6 U. S. T., at 3320 (¶ (1)*(d)*)—necessarily

requires that the accused have the right to be present at all stages of a criminal trial. As JUSTICE STEVENS explains, MCO No. 1 authorizes exclusion of the accused from the proceedings if the presiding officer determines that, among other things, protection of classified information so requires. See §§6(B)(3), (D)(5); *ante*, at 613–614. JUSTICE STEVENS observes that these regulations create the possibility of a conviction and sentence based on evidence Hamdan has not seen or heard—a possibility the plurality is correct to consider troubling. *Ante*, at 634–635, and n. 67 (collecting cases); see also *In re Oliver*, 333 U. S. 257, 277 (1948) (finding "no support for sustaining petitioner's conviction of contempt of court upon testimony given in petitioner's absence").

As the dissent by JUSTICE THOMAS points out, however, the regulations bar the presiding officer from admitting secret evidence if doing so would deprive the accused of a "full and fair trial." MCO No. 1, §6(D)(5)(b); see also *post*, at 722–723. This fairness determination, moreover, is unambiguously subject to judicial review under the DTA. See §1005(e)(3)(D)(i), 119 Stat. 2743 (allowing review of compliance with the "standards and procedures" in MCO No. 1). The evidentiary proceedings at Hamdan's trial have yet to commence, and it remains to be seen whether he will suffer any prejudicial exclusion.

There should be reluctance, furthermore, to reach unnecessarily the question whether, as the plurality seems to conclude, *ante*, at 633, Article 75 of Protocol I to the Geneva Conventions is binding law notwithstanding the earlier decision by our Government not to accede to the Protocol. For all these reasons, and without detracting from the importance of the right of presence, I would rely on other deficiencies noted here and in the opinion by the Court—deficiencies that relate to the structure and procedure of the commission and that inevitably will affect the proceedings—as the basis for finding the military commissions lack au-

thorization under 10 U. S. C. § 836 and fail to be regularly constituted under Common Article 3 and § 821.

I likewise see no need to address the validity of the conspiracy charge against Hamdan—an issue addressed at length in Part V of JUSTICE STEVENS' opinion and in Part II–C of JUSTICE THOMAS' dissent. See *ante*, at 600–613; *post*, at 689–704. In light of the conclusion that the military commissions at issue are unauthorized, Congress may choose to provide further guidance in this area. Congress, not the Court, is the branch in the better position to undertake the "sensitive task of establishing a principle not inconsistent with the national interest or with international justice." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 428 (1964).

Finally, for the same reason, I express no view on the merits of other limitations on military commissions described as elements of the common law of war in Part V of JUSTICE STEVENS' opinion. See *ante*, at 595–600, 611–613; *post*, at 683–689 (THOMAS, J., dissenting).

With these observations I join the Court's opinion with the exception of Parts V and VI–D–iv.

JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

On December 30, 2005, Congress enacted the Detainee Treatment Act (DTA). It unambiguously provides that, as of that date, "no court, justice, or judge" shall have jurisdiction to consider the habeas application of a Guantanamo Bay detainee. Notwithstanding this plain directive, the Court today concludes that, on what it calls the statute's *most natural* reading, *every* "court, justice, or judge" before whom such a habeas application was pending on December 30 has jurisdiction to hear, consider, and render judgment on it. This conclusion is patently erroneous. And even if it were not, the jurisdiction supposedly retained should, in an exercise of sound equitable discretion, not be exercised.

I

A

The DTA provides: "[N]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." § 1005(e)(1), 119 Stat. 2742 (internal division omitted). This provision "t[ook] effect on the date of the enactment of this Act," § 1005(h)(1), *id.*, at 2743, which was December 30, 2005. As of that date, then, *no* court had jurisdiction to "hear or consider" the merits of petitioner's habeas application. This repeal of jurisdiction is simply not ambiguous as between pending and future cases. It prohibits *any* exercise of jurisdiction, and it became effective as to *all* cases last December 30. It is also perfectly clear that the phrase "no court, *justice*, or judge" includes this Court and its Members, and that by exercising our appellate jurisdiction in this case we are "hear[ing] or consider[ing] . . . an application for a writ of habeas corpus."

An ancient and unbroken line of authority attests that statutes ousting jurisdiction unambiguously apply to cases pending at their effective date. For example, in *Bruner* v. *United States*, 343 U. S. 112 (1952), we granted certiorari to consider whether the Tucker Act's provision denying district court jurisdiction over suits by "officers" of the United States barred a suit by an *employee* of the United States. After we granted certiorari, Congress amended the Tucker Act by adding suits by "'employees'" to the provision barring jurisdiction over suits by officers. *Id.*, at 114. This statute narrowing the jurisdiction of the district courts "became effective" while the case was pending before us, *ibid.*, and made no explicit reference to pending cases. Because the statute "did not reserve jurisdiction over pending cases," *id.*, at 115, we held that it clearly ousted jurisdiction over them. Summarizing centuries of practice, we said: "This

rule—that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law—has been adhered to consistently by this Court." *Id.*, at 116–117. See also *Landgraf* v. *USI Film Products*, 511 U. S. 244, 274 (1994) (opinion for the Court by STEVENS, J.) ("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed").

This venerable rule that statutes ousting jurisdiction terminate jurisdiction in pending cases is not, as today's opinion for the Court would have it, a judge-made "presumption against jurisdiction," *ante*, at 576, that we have invented to resolve an ambiguity in the statutes. It is simple recognition of the reality that the *plain import* of a statute repealing jurisdiction is to eliminate the power to consider and render judgment—in an already pending case no less than in a case yet to be filed.

> "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. *And this is not less clear upon authority than upon principle.*" *Ex parte McCardle*, 7 Wall. 506, 514 (1869) (emphasis added).

To alter this plain meaning, our cases have required an explicit reservation of pending cases in the jurisdiction-repealing statute. For example, *Bruner*, as mentioned, looked to whether Congress made "any reservation as to pending cases." 343 U. S., at 116–117; see also *id.*, at 115 ("Congress made no provision for cases pending at the effective date of the Act withdrawing jurisdiction and, for this reason, Courts of Appeals ordered pending cases terminated for want of jurisdiction"). Likewise, in *Hallowell* v. *Commons*, 239 U. S. 506 (1916), Justice Holmes relied on the fact

that the jurisdiction-ousting provision "made no exception for pending litigation, but purported to be universal," *id.*, at 508. And in *Insurance Co.* v. *Ritchie*, 5 Wall. 541 (1867), we again relied on the fact that the jurisdictional repeal was made "without any saving of such causes as that before us," *id.*, at 544. As in *Bruner*, *Hallowell*, and *Ritchie*, the DTA's directive that "no court, justice, or judge shall have jurisdiction," § 1005(e)(1), 119 Stat. 2742, is made "without any reservation as to pending cases" and "purport[s] to be universal." What we stated in an earlier case remains true here: "[W]hen, if it had been the intention to confine the operation of [the jurisdictional repeal] . . . to cases not pending, it would have been so easy to have said so, we must presume that Congress meant the language employed should have its usual and ordinary signification, and that the old law should be unconditionally repealed." *Railroad Co.* v. *Grant*, 98 U. S. 398, 403 (1879).

The Court claims that I "rea[d] too much into" the *Bruner* line of cases, *ante*, at 577, n. 7, and that "the *Bruner* rule" has never been "an inflexible trump," *ante*, at 584. But the Court sorely misdescribes *Bruner*—as if it were a kind of early-day *Lindh* v. *Murphy*, 521 U. S. 320 (1997), resolving statutory ambiguity by oblique negative inference. On the contrary, as described above, *Bruner* stated its holding as an unqualified "rule," which "has been adhered to consistently by this Court." 343 U. S., at 116–117. Though *Bruner* referred to an express saving clause elsewhere in the statute, *id.*, at 115, n. 7, it disavowed any reliance on such oblique indicators to vary the plain meaning, quoting *Ritchie* at length: "'It is quite possible that this effect of the [jurisdiction-stripping statute] was not contemplated by Congress. . . . [B]ut when terms are unambiguous we may not speculate on probabilities of intention.'" 343 U. S., at 116 (quoting 5 Wall., at 544–545).

The Court also attempts to evade the *Bruner* line of cases by asserting that "the 'presumption' [of application to pend-

ing cases] that these cases have applied is more accurately viewed as the nonapplication of another presumption—viz., the presumption against retroactivity—in certain limited circumstances." *Ante*, at 576. I have already explained that what the Court calls a "presumption" is simply the acknowledgment of the unambiguous meaning of such provisions. But even taking it to be what the Court says, the effect upon the present case would be the same. *Prospective* applications of a statute are "effective" upon the statute's effective date; that is what an effective-date provision like § 1005(h)(1) *means*.[1] "'[S]hall take effect upon enactment' is presumed to mean 'shall have prospective effect upon enactment,' and that presumption is too strong to be overcome by any negative inference [drawn from other provisions of the statute]." *Landgraf*, *supra*, at 288 (SCALIA, J., concurring in judgments). The Court's "nonapplication of . . . the presumption against retroactivity" to § 1005(e)(1) is thus just another way of stating that the statute takes immediate effect in pending cases.

Though the Court resists the *Bruner* rule, it cannot cite a *single case* in the history of Anglo-American law (before

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[1] The Court apparently believes that the effective-date provision means nothing at all. "That paragraph (1), along with paragraphs (2) and (3), is to 'take effect on the date of the enactment,' DTA § 1005(h)(1), 119 Stat. 2743, is not dispositive," says the Court, *ante*, at 579, n. 9. The Court's authority for this conclusion is its quote from *INS* v. *St. Cyr*, 533 U. S. 289, 317 (2001), to the effect that "a statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct *that occurred at an earlier date*." *Ante*, at 579, n. 9 (emphasis added and internal quotation marks omitted). But this quote merely restates the obvious: An effective-date provision does not render a statute applicable to "conduct that occurred at an *earlier* date," but of course it renders the statute applicable to conduct that occurs *on the effective date and all future dates*—such as the Court's exercise of jurisdiction here. The Court seems to suggest that, because the effective-date provision does not authorize retroactive application, it also fails to authorize prospective application (and is thus useless verbiage). This cannot be true.

today) in which a jurisdiction-stripping provision was denied immediate effect in pending cases, absent an explicit statutory reservation. By contrast, the cases granting such immediate effect are legion, and they repeatedly rely on the plain language of the jurisdictional repeal as an "inflexible trump," *ante*, at 584, by requiring an express reservation to save pending cases. See, *e. g.*, *Bruner*, *supra*, at 115; *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 234 (1922); *Hallowell*, 239 U. S., at 508; *Gwin* v. *United States*, 184 U. S. 669, 675 (1902); *Gurnee* v. *Patrick County*, 137 U. S. 141, 144 (1890); *Sherman* v. *Grinnell*, 123 U. S. 679, 680 (1887); *Railroad Co.* v. *Grant*, *supra*, at 403, *Assessors* v. *Osbornes*, 9 Wall. 567, 575 (1870); *Ex parte McCardle*, 7 Wall., at 514; *Ritchie*, *supra*, at 544; *Norris* v. *Crocker*, 13 How. 429, 440 (1852); *Yeaton* v. *United States*, 5 Cranch 281 (1809) (Marshall, C. J.), discussed in *Gwin*, *supra*, at 675; *King* v. *Justices of the Peace of London*, 3 Burr. 1456, 1457, 97 Eng. Rep. 924, 925 (K. B. 1764). Cf. *National Exchange Bank of Baltimore* v. *Peters*, 144 U. S. 570, 572 (1892).

B

Disregarding the plain meaning of § 1005(e)(1) and the requirement of explicit exception set forth in the foregoing cases, the Court instead favors "a negative inference . . . from the exclusion of language from one statutory provision that is included in other provisions of the same statute," *ante*, at 578. Specifically, it appeals to the fact that § 1005(e)(2) and (e)(3) are explicitly made applicable to pending cases (by § 1005(h)(2)). A negative inference of the sort the Court relies upon might clarify the meaning of an ambiguous provision, but since the meaning of § 1005(e)(1) is entirely clear, the omitted language in that context would have been redundant.

Even if § 1005(e)(1) were at all ambiguous in its application to pending cases, the "negative inference" from § 1005(h)(2) touted by the Court would have no force. The numerous

cases in the *Bruner* line would at least create a powerful default "presumption against jurisdiction," *ante*, at 576. The negative inference urged by the Court would be a particularly awkward and indirect way of rebutting such a long-standing and consistent practice. This is especially true since the negative inference that might be drawn from § 1005(h)(2)'s specification that certain provisions *shall* apply to pending cases is matched by a negative inference in the opposite direction that might be drawn from § 1005(b)(2), which provides that certain provisions shall *not* apply to pending cases.

The Court's reliance on our opinion in *Lindh* v. *Murphy*, 521 U. S. 320 (1997), is utterly misplaced. *Lindh* involved two provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA): a set of amendments to chapter 153 of the federal habeas statute that redefined the scope of collateral review by federal habeas courts; and a provision creating a new chapter 154 in the habeas statute specially to govern federal collateral review of state capital cases. See 521 U. S., at 326–327. The latter provision explicitly rendered the new chapter 154 applicable to cases pending at the time of AEDPA's enactment; the former made no specific reference to pending cases. *Id.*, at 327. In *Lindh*, we drew a negative inference from chapter 154's explicit reference to pending cases, to conclude that the chapter 153 amendments did *not* apply in pending cases. It was essential to our reasoning, however, that both provisions appeared to be *identically difficult* to classify under our retroactivity cases. First, we noted that, after *Landgraf*, there was reason for Congress to suppose that an explicit statement was required to render the amendments to chapter 154 applicable in pending cases, because the new chapter 154 "will have substantive as well as purely procedural effects." 521 U. S., at 327. The next step—and the critical step—in our reasoning was that Congress had *identical* reason to suppose that an explicit statement would be required to apply the chapter 153

amendments to pending cases, but did not provide it. *Id.*, at 329. The negative inference of *Lindh* rested on the fact that "[n]othing . . . but a different intent explain[ed] the different treatment." *Ibid.*

Here, by contrast, there is ample reason for the different treatment. The exclusive-review provisions of the DTA, unlike both § 1005(e)(1) and the AEDPA amendments in *Lindh*, confer *new* jurisdiction (in the D. C. Circuit) where there was none before. For better or for worse, our recent cases have contrasted jurisdiction-*creating* provisions with jurisdiction-*ousting* provisions, retaining the venerable rule that the latter are not retroactive even when applied in pending cases, but strongly indicating that the former are typically retroactive. For example, we stated in *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939, 951 (1997), that a statute that "*creates* jurisdiction where none previously existed" is "as much subject to our presumption against retroactivity as any other." See also *Republic of Austria* v. *Altmann*, 541 U. S. 677, 695 (2004) (opinion for the Court by STEVENS, J.); *id.*, at 722 (KENNEDY, J., dissenting). The Court gives our retroactivity jurisprudence a dazzling clarity in asserting that "subsections (e)(2) and (e)(3) 'confer' jurisdiction in a manner that cannot conceivably give rise to retroactivity questions under our precedents."[2] *Ante*, at

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[2] A comparison with *Lindh* v. *Murphy*, 521 U. S. 320 (1997), shows this not to be true. Subsections (e)(2) and (e)(3) of § 1005 resemble the provisions of AEDPA at issue in *Lindh* (whose retroactivity as applied to pending cases the *Lindh* majority did not rule upon, see *id.*, at 326), in that they "g[o] beyond 'mere' procedure," *id.*, at 327. They impose novel and unprecedented disabilities on the Executive Branch in its conduct of military affairs. Subsection (e)(2) imposes judicial review on the Combatant Status Review Tribunals (CSRTs), whose implementing order did not subject them to review by Article III courts. See Memorandum from Deputy Secretary of Defense Paul Wolfowitz re: Order Establishing Combatant Status Review Tribunals, p. 3, § *h* (July 7, 2004), available at http://www.defenselink.mil/news/Jul2004/d20040707review.pdf (all Internet ma-

582. This statement rises to the level of sarcasm when one considers its author's description of the governing test of our retroactivity jurisprudence:

> "The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have 'sound . . . instinct[s],' . . . and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Landgraf*, 511 U. S., at 270 (opinion for the Court by STEVENS, J.).

The only "familiar consideration," "reasonable reliance," and "settled expectation" I am aware of pertaining to the present

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terials as visited June 27, 2006, and available in Clerk of Court's case file). Subsection (e)(3) authorizes the D. C. Circuit to review "the validity of any final decision rendered pursuant to Military Commission Order No. 1," § 1005(e)(3)(A), 119 Stat. 2743. Historically, federal courts have *never* reviewed the validity of the final decision of any military commission; their jurisdiction has been restricted to considering the commission's "lawful *authority* to hear, decide and condemn," *In re Yamashita*, 327 U. S. 1, 8 (1946) (emphasis added). See also *Johnson* v. *Eisentrager*, 339 U. S. 763, 786–787 (1950). Thus, contrary to the Court's suggestion, *ante*, at 581, 582, subsections (e)(2) and (e)(3) confer new jurisdiction: They impose judicial oversight on a traditionally unreviewable exercise of military authority by the Commander in Chief. They arguably "spea[k] not just to the power of a particular court but to . . . substantive rights . . . as well," *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939, 951 (1997)—namely, the unreviewable powers of the President. Our recent cases had reiterated that the Executive is protected by the presumption against retroactivity in such comparatively trivial contexts as suits for tax refunds and increased pay, see *Landgraf* v. *USI Film Products*, 511 U. S. 244, 271, n. 25 (1994).

case is the rule of *Bruner*—applicable to § 1005(e)(1), but not to § 1005(e)(2) and (e)(3)—which the Court stubbornly disregards. It is utterly beyond question that § 1005(e)(2)'s and (3)'s application to pending cases (without explicit specification) was not as clear as § 1005(e)(1)'s. That is alone enough to explain the difference in treatment.

Another obvious reason for the specification was to stave off any Suspension Clause problems raised by the immediately effective ouster of jurisdiction brought about by subsection (e)(1). That is to say, specification of the immediate effectiveness of subsections (e)(2) and (e)(3) (which, unlike subsection (e)(1), would not fall within the *Bruner* rule and would not *automatically* be deemed applicable in pending cases) could reasonably have been thought essential to be sure of replacing the habeas jurisdiction that subsection (e)(1) eliminated in pending cases with an adequate substitute. See *infra*, at 670–672.

These considerations by no means prove that an explicit statement would be *required* to render subsections (e)(2) and (e)(3) applicable in pending cases. But they surely gave Congress ample reason to *doubt* that their application in pending cases would unfold as naturally as the Court glibly assumes. In any event, even if it were true that subsections (e)(2) and (e)(3) "'confer' jurisdiction in a manner that cannot conceivably give rise to retroactivity questions," *ante*, at 582, this would merely establish that subsection (h)(2)'s reference to pending cases was wholly superfluous when applied to subsections (e)(2) and (e)(3), just as it would have been for subsection (e)(1). *Lindh*'s negative inference makes sense only when Congress would have perceived "the wisdom of being explicit" with respect to the immediate application of *both* of two statutory provisions, 521 U. S., at 328, but chose to be explicit only for one of them—not when it would have perceived *no need* to be explicit for both, but enacted a redundancy only for one.

In short, it is simply untrue that Congress "'should have been just as concerned about'" specifying the application of § 1005(e)(1) to pending cases, *ante*, at 578 (quoting *Lindh*, *supra*, at 329). In fact, the negative-inference approach of *Lindh* is particularly inappropriate in this case, because the negative inference from § 1005(h)(2) would tend to defeat the purpose of the very provisions that *are* explicitly rendered applicable in pending cases, § 1005(e)(2) and (3). Those provisions purport to vest "exclusive" jurisdiction in the D. C. Circuit to consider the claims raised by petitioner here. See *infra*, at 670–672. By drawing a negative inference *à la Lindh*, the Court supplants this exclusive-review mechanism with a dual-review mechanism for petitioners who were expeditious enough to file applications challenging the CSRTs or military commissions before December 30, 2005. Whatever the force of *Lindh*'s negative inference in other cases, it surely should not apply here to defeat the purpose of the very provision from which the negative inference is drawn.

C

Worst of all is the Court's reliance on the legislative history of the DTA to buttress its implausible reading of § 1005(e)(1). We have repeatedly held that such reliance is impermissible where, as here, the statutory language is unambiguous. But the Court nevertheless relies both on floor statements from the Senate and (quite heavily) on the drafting history of the DTA. To begin with floor statements: The Court urges that some "statements made by Senators preceding passage of the Act lend further support to" the Court's interpretation, citing excerpts from the floor debate that support its view, *ante*, at 580, n. 10. The Court immediately goes on to discount numerous floor statements by the DTA's sponsors that flatly contradict its view, because "those statements appear to have been inserted into the Congressional Record *after* the Senate debate." *Ibid.* Of course this observation, even if true, makes no difference

unless one indulges the fantasy that Senate floor speeches are attended (like the Philippics of Demosthenes) by throngs of eager listeners, instead of being delivered (like Demosthenes' practice sessions on the beach) alone into a vast emptiness. Whether the floor statements are spoken where no Senator hears, or written where no Senator reads, they represent at most the views of a single Senator. In any event, the Court greatly exaggerates the one-sidedness of the portions of the floor debate that clearly occurred before the DTA's enactment. Some of the statements of Senator Graham, a sponsor of the bill, only make sense on the assumption that pending cases are covered.[3] And at least one opponent of the DTA unmistakably expressed his understanding that it would terminate our jurisdiction in this very case.[4] (Of course in its discussion of legislative history the Court wholly ignores the President's signing statement, which explicitly set forth *his* understanding that the DTA ousted jurisdiction over pending cases.[5])

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[3] "Because I have described how outrageous these claims are—about the exercise regime, the reading materials—most Americans would be highly offended to know that terrorists are suing us in our own courts about what they read." 151 Cong. Rec. S12756 (Nov. 14, 2005). "Instead of having unlimited habeas corpus opportunities under the Constitution, we give every enemy combatant, all 500, a chance to go to Federal court, the Circuit Court of Appeals for the District of Columbia. . . . It will be a one-time deal." *Id.*, at S12754. "This Levin-Graham-Kyl amendment allows every detainee under our control to have their day in court. They are allowed to appeal their convictions." *Id.*, at S12801 (Nov. 15, 2005); see also *id.*, at S12799 (rejecting the notion that "an enemy combatant terrorist al-Qaida member should be able to have access to our Federal courts under habeas like an American citizen").

[4] "An earlier part of the amendment provides that no court, justice, or judge shall have jurisdiction to consider the application for writ of habeas corpus. . . . Under the language of exclusive jurisdiction in the DC Circuit, the U. S. Supreme Court would not have jurisdiction to hear the Hamdan case . . . ." *Id.*, at S12796 (statement of Sen. Specter).

[5] "[T]he executive branch shall construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, de-

But selectivity is not the greatest vice in the Court's use of floor statements to resolve today's case. These statements were made when Members of Congress were fully aware that our continuing jurisdiction *over this very case* was at issue. The question was divisive, and floor statements made on both sides were undoubtedly opportunistic and crafted *solely* for use in the briefs in this very litigation. See, *e. g.*, 151 Cong. Rec. S14257–S14258 (Dec. 21, 2005) (statement of Sen. Levin) (arguing against a reading that would "stri[p] the Federal courts of jurisdiction to consider pending cases, *including the Hamdan case now pending in the Supreme Court*," and urging that *Lindh* requires the same negative inference that the Court indulges today (emphasis added)). The Court's reliance on such statements cannot avoid the appearance of similar opportunism. In a virtually identical context, the author of today's opinion has written for the Court that "[t]he legislative history discloses some frankly partisan statements about the meaning of the final effective date language, but those statements cannot plausibly be read as reflecting any general agreement." *Landgraf*, 511 U. S., at 262 (opinion for the Court by STEVENS, J.). Likewise, the handful of floor statements that the Court treats as authoritative do not "reflec[t] any general agreement." They reflect the now-common tactic—which the Court once again rewards—of pursuing through floor-speech *ipse dixit* what could not be achieved through the constitutionally prescribed method of putting language into a bill that a majority of both Houses vote for and the President signs.

With regard to the floor statements, at least the Court shows some semblance of seemly shame, tucking away its

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scribed in section 1005." President's Statement on Signing of H. R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006" (Dec. 30, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/print/20051230-8.html.

reference to them in a halfhearted footnote. Not so for its reliance on the DTA's drafting history, which is displayed prominently, see *ante*, at 579–580. I have explained elsewhere that such drafting history is no more legitimate or reliable an indicator of the objective meaning of a statute than any other form of legislative history. This case presents a textbook example of its unreliability. The Court, *ante*, at 579, trumpets the fact that a bill considered in the Senate included redundant language, not included in the DTA as passed, reconfirming that the abolition of habeas jurisdiction "shall apply to any application or other action that is pending on or after the date of the enactment of this Act." 151 Cong. Rec. S12655 (Nov. 10, 2005). But this earlier version of the bill also differed from the DTA in other material respects. Most notably, it provided for postdecision review by the D. C. Circuit only of the decisions of *CSRTs*, not military commissions, *ibid.*; and it limited that review to whether "the status determination . . . was consistent with the procedures and standards specified by the Secretary of Defense," *ibid.*, not whether "the use of such standards and procedures . . . is consistent with the Constitution and laws of the United States," DTA § 1005(e)(2)(C)(ii), 119 Stat. 2742. To say that what moved Senators to reject this earlier bill was the "action that is pending" provision surpasses the intuitive powers of even this Court's greatest Justices.[6] And to think that the House and the President also had this rejection firmly in mind is absurd. As always—but *especially* in the context of strident, partisan legislative conflict of the sort that characterized enactment of this legislation—the language of the statute that was actually passed by both Houses of Congress and signed by the President is our only authoritative and only reliable guidepost.

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[6] The Court asserts that "it cannot be said that the changes to subsection (h)(2) were inconsequential," *ante*, at 580, n. 10, but the Court's sole evidence is the self-serving floor statements that it selectively cites.

D

A final but powerful indication of the fact that the Court has made a mess of this statute is the nature of the consequences that ensue. Though this case concerns a habeas application challenging a trial by military commission, DTA § 1005(e)(1) strips the courts of jurisdiction to hear or consider *any* "application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." The vast majority of pending petitions, no doubt, do not relate to military commissions at all, but to more commonly challenged aspects of "detention" such as the terms and conditions of confinement. See *Rasul* v. *Bush*, 542 U. S. 466, 498 (2004) (SCALIA, J., dissenting). The Solicitor General represents that "[h]abeas petitions have been filed on behalf of a purported 600 [Guantanamo Bay] detainees," including one that "seek[s] relief on behalf of every Guantanamo detainee who has not already filed an action," Respondents' Motion to Dismiss for Lack of Jurisdiction 20, n. 10 (hereinafter Motion to Dismiss). The Court's interpretation transforms a provision abolishing jurisdiction over *all* Guantanamo-related habeas petitions into a provision that retains jurisdiction over cases sufficiently numerous to keep the courts busy for years to come.

II

Because I would hold that § 1005(e)(1) unambiguously terminates the jurisdiction of all courts to "hear or consider" pending habeas applications, I must confront petitioner's arguments that the provision, so interpreted, violates the Suspension Clause. This claim is easily dispatched. We stated in *Johnson* v. *Eisentrager*, 339 U. S. 763, 768 (1950):

> "We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitu-

> tion extends such a right, nor does anything in our statutes."

Notwithstanding the ill-considered dicta in the Court's opinion in *Rasul*, 542 U. S., at 480–481, it is clear that Guantanamo Bay, Cuba, is outside the sovereign "territorial jurisdiction" of the United States. See *id.*, at 500–505 (SCALIA, J., dissenting). Petitioner, an enemy alien detained abroad, has no rights under the Suspension Clause.

But even if petitioner were fully protected by the Clause, the DTA would create no suspension problem. This Court has repeatedly acknowledged that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Swain* v. *Pressley*, 430 U. S. 372, 381 (1977); see also *INS* v. *St. Cyr*, 533 U. S. 289, 314, n. 38 (2001) ("Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals").

Petitioner has made no showing that the postdecision exclusive review by the D. C. Circuit provided in § 1005(e)(3) is inadequate to test the legality of his trial by military commission. His principal argument is that the exclusive-review provisions are inadequate because they foreclose review of the claims he raises here. Though petitioner's brief does not parse the statutory language, his argument evidently rests on an erroneously narrow reading of DTA § 1005(e)(3)(D)(ii), 119 Stat. 2743. That provision grants the D. C. Circuit authority to review, "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States." In the quoted text, the phrase "such standards and procedures" refers to "the standards and procedures specified in the military order referred to in subparagraph (A)," namely, "Military Commission Order No. 1, dated August 31, 2005 (or any successor military order)." DTA

§ 1005(e)(3)(D)(i), (e)(3)(A), *ibid.* This Military Commission Order (Order No. 1) is the Department of Defense's fundamental implementing order for the President's order authorizing trials by military commission. Order No. 1 establishes commissions, § 2; delineates their jurisdiction, § 3; provides for their officers, § 4(A); provides for their prosecution and defense counsel, § 4(B), (C); lays out all their procedures, both pretrial and trial, § 5(A)–(P), § 6(A)–(G); and provides for post-trial military review through the Secretary of Defense and the President, § 6(H). In short, the "standards and procedures specified in" Order No. 1 include *every aspect* of the military commissions, including the fact of their existence and every respect in which they differ from courts-martial. Petitioner's claims that the President lacks legal authority to try him before a military commission constitute claims that "the use of such standards and procedures," as specified in Order No. 1, is "[in]consistent with the Constitution and laws of the United States," DTA § 1005(e)(3)(D)(ii), 119 Stat. 2743. The D. C. Circuit thus retains jurisdiction to consider these claims on postdecision review, and the Government does not dispute that the DTA leaves unaffected our certiorari jurisdiction under 28 U. S. C. § 1254(1) to review the D. C. Circuit's decisions. Motion to Dismiss 16, n. 8. Thus, the DTA merely *defers* our jurisdiction to consider petitioner's claims; it does not eliminate that jurisdiction. It constitutes neither an "inadequate" nor an "ineffective" substitute for petitioner's pending habeas application.[7]

[7] Petitioner also urges that he could be subject to indefinite delay if military officials and the President are deliberately dilatory in reviewing the decision of his commission. In reviewing the constitutionality of legislation, we generally presume that the Executive will implement its provisions in good faith. And it is unclear in any event that delay would inflict any injury on petitioner, who (after an adverse determination by his CSRT, see 344 F. Supp. 2d 152, 161 (DC 2004)) is *already* subject to indefinite detention under our decision in *Hamdi* v. *Rumsfeld*, 542 U. S. 507 (2004) (plurality opinion). Moreover, the mere possibility of delay does not render an alternative remedy "inadequate [o]r ineffective to test

Though it does not squarely address the issue, the Court hints ominously that "the Government's preferred reading" would "rais[e] grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction, particularly in habeas cases." *Ante*, at 575 (citing *Ex parte Yerger*, 8 Wall. 85 (1869); *Felker* v. *Turpin*, 518 U. S. 651 (1996); *Durousseau* v. *United States*, 6 Cranch 307 (1810); *United States* v. *Klein*, 13 Wall. 128 (1872); and *Ex parte McCardle*, 7 Wall. 506). It is not clear how there could be any such lurking questions, in light of the aptly named "*Exceptions* Clause" of Article III, § 2, which, in making our appellate jurisdiction subject to "such Exceptions, and under such Regulations as the Congress shall make," explicitly permits exactly what Congress has done here. But any doubt our prior cases might have created on this score is surely chimerical in *this* case. As just noted, the exclusive-review provisions provide a substitute for habeas review adequate to satisfy the Suspension Clause, which *forbids* the suspension of the writ of habeas corpus. *A fortiori* they provide a substitute adequate to satisfy any implied substantive limitations, whether real or imaginary, upon the Exceptions Clause, which *authorizes* such exceptions as § 1005(e)(1).

III

Even if Congress had not clearly and constitutionally eliminated jurisdiction over this case, neither this Court nor the lower courts ought to exercise it. Traditionally, equitable principles govern both the exercise of habeas jurisdiction and the granting of the injunctive relief sought by petitioner. See *Schlesinger* v. *Councilman*, 420 U. S. 738, 754 (1975);

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the legality" of a military commission trial. *Swain* v. *Pressley*, 430 U. S. 372, 381 (1977). In an analogous context, we discounted the notion that postponement of relief until postconviction review inflicted any cognizable injury on a serviceman charged before a military court-martial. *Schlesinger* v. *Councilman*, 420 U. S. 738, 754–755 (1975); see also *Younger* v. *Harris*, 401 U. S. 37, 46 (1971).

Weinberger v. *Romero-Barcelo*, 456 U. S. 305, 311 (1982). In light of Congress's provision of an alternate avenue for petitioner's claims in § 1005(e)(3), those equitable principles counsel that we abstain from exercising jurisdiction in this case.

In requesting abstention, the Government relies principally on *Councilman*, in which we abstained from considering a serviceman's claim that his charge for marijuana possession was not sufficiently "service-connected" to trigger the subject-matter jurisdiction of the military courts-martial. See 420 U. S., at 740, 758. Admittedly, *Councilman* does not squarely control petitioner's case, but it provides the closest analogue in our jurisprudence. As the Court describes, *ante*, at 586, *Councilman* "identifie[d] two considerations of comity that together favor[ed] abstention pending completion of ongoing court-martial proceedings against service personnel." But the Court errs in finding these considerations inapplicable to this case. Both of them, and a third consideration not emphasized in *Councilman*, all cut in favor of abstention here.

First, the Court observes that *Councilman* rested in part on the fact that "military discipline and, therefore, the efficient operation of the Armed Forces are best served if the military justice system acts without regular interference from civilian courts," and concludes that "Hamdan is not a member of our Nation's Armed Forces, so concerns about military discipline do not apply." *Ante*, at 586, 587. This is true enough. But for some reason, the Court fails to make any inquiry into whether military commission trials might involve *other* "military necessities" or "unique military exigencies," 420 U. S., at 757, comparable in gravity to those at stake in *Councilman*. To put this in context: The charge against the respondent in *Councilman* was the off-base possession and sale of marijuana while he was stationed in Fort Sill, Oklahoma, see *id.*, at 739–740. The charge against the petitioner here is joining and actively abetting the murderous conspiracy that slaughtered thousands of innocent Amer-

ican civilians without warning on September 11, 2001. While *Councilman* held that the prosecution of the former charge involved "military necessities" counseling against our interference, the Court *does not even ponder the same question* for the latter charge.

The reason for the Court's "blinkered study" of this question, *ante*, at 584, is not hard to fathom. The principal opinion on the merits makes clear that it does not believe that the trials by military commission involve any "military necessity" *at all:* "The charge's shortcomings . . . are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition . . . for establishment of military commissions: military necessity." *Ante*, at 612. This is quite at odds with the views on this subject expressed by our political branches. Because of "military necessity," a joint session of Congress authorized the President to "use all necessary and appropriate force," including military commissions, "against those nations, organizations, or persons [such as petitioner] he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, § 2(a), 115 Stat. 224, note following 50 U. S. C. § 1541 (2000 ed., Supp. III). In keeping with this authority, the President has determined that "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals." Military Order of Nov. 13, 2001, 3 CFR, 2001 Comp., § 1(e), p. 918 (2002) (hereinafter Military Order). It is not clear where the Court derives the authority—or the audacity—to contradict this determination. If "military necessities" relating to "duty" and "discipline" required abstention in *Councilman*, *supra*, at 757, military necessities relating to the disabling, deterrence, and punish-

ment of the mass-murdering terrorists of September 11 require abstention all the more here.

The Court further seeks to distinguish *Councilman* on the ground that "the tribunal convened to try Hamdan is not part of the integrated system of military courts, complete with independent review panels, that Congress has established." *Ante*, at 587. To be sure, *Councilman* emphasized that "Congress created an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges completely removed from all military influence or persuasion, who would gain over time thorough familiarity with military problems." 420 U. S., at 758 (internal quotation marks and footnote omitted). The Court contrasts this "integrated system" insulated from military influence with the review scheme established by Order No. 1, which "provides that appeal of a review panel's decision may be had only to the Secretary himself, § 6(H)(5), and then, finally, to the President, § 6(H)(6)." *Ante*, at 587.

Even if we were to accept the Court's extraordinary assumption that the President "lack[s] the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces," *ante*, at 587–588,[8] the Court's description of the review scheme here is anachronistic. As of December 30, 2005, the "fina[l]" review of decisions by military commissions is now conducted by the D. C. Circuit pursuant to § 1005(e)(3) of the DTA, and by this Court under 28 U. S. C. § 1254(1). This provision for review by Article III courts creates, if anything, a review scheme *more* insu-

[8] The very purpose of Article II's creation of a *civilian* Commander in Chief in the President of the United States was to generate "structural insulation from military influence." See The Federalist No. 28 (A. Hamilton); *id.*, No. 69 (same). We do not live under a military junta. It is a disservice to both those in the Armed Forces and the President to suggest that the President is subject to the undue control of the military.

lated from executive control than that in *Councilman*.[9] At the time we decided *Councilman*, Congress had not "conferred on any Art[icle] III court jurisdiction directly to review court-martial determinations." 420 U. S., at 746. The final arbiter of direct appeals was the Court of Military Appeals (now the Court of Appeals for the Armed Forces), an Article I court whose members possessed neither life tenure, nor salary protection, nor the constitutional protection from removal provided to federal judges in Article III, § 1. See 10 U. S. C. § 867(a)(2) (1970 ed.).

Moreover, a third consideration counsels strongly in favor of abstention in this case. *Councilman* reasoned that the "considerations of comity, the necessity of respect for coordinate judicial systems" that motivated our decision in *Younger* v. *Harris*, 401 U. S. 37 (1971), were inapplicable to courts-martial, because "the peculiar demands of federalism are not implicated." 420 U. S., at 756, 757. Though military commissions likewise do not implicate "the peculiar demands of federalism," considerations of *interbranch* comity

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[9] In rejecting our analysis, the Court observes that appeals to the D. C. Circuit under subsection (e)(3) are discretionary, rather than as of right, when the military commission imposes a sentence less than 10 years' imprisonment, see *ante*, at 588, n. 19, 616; § 1005(e)(3)(B), 119 Stat. 2743. The relevance of this observation to the abstention question is unfathomable. The fact that Article III review is discretionary does not mean that it lacks "structural insulation from military influence," *ante*, at 587, and its discretionary nature presents no obstacle to the courts' future review of these cases.

The Court might more cogently have relied on the discretionary nature of review to argue that the statute provides an inadequate substitute for habeas review under the Suspension Clause. See *supra*, at 670–672. But this argument would have no force, even if *all* appeals to the D. C. Circuit were discretionary. The exercise of habeas jurisdiction has traditionally been entirely a matter of the court's equitable discretion, see *Withrow* v. *Williams*, 507 U. S. 680, 715–718 (1993) (SCALIA, J., concurring in part and dissenting in part), so the fact that habeas jurisdiction is replaced by discretionary appellate review does not render the substitution "inadequate." *Swain*, 430 U. S., at 381.

at the federal level weigh heavily against our exercise of equity jurisdiction in this case. Here, apparently for the first time in history, see Motion to Dismiss 6, a District Court enjoined ongoing military commission proceedings, which had been deemed "necessary" by the President "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks." Military Order § 1(e). Such an order brings the Judicial Branch into direct conflict with the Executive in an area where the Executive's competence is maximal and ours is virtually nonexistent. We should exercise our equitable discretion to *avoid* such conflict. Instead, the Court rushes headlong to meet it. Elsewhere, we have deferred exercising habeas jurisdiction until state courts have "the first opportunity to review" a petitioner's claim, merely to "reduc[e] friction between the state and federal court systems." *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 844, 845 (1999). The "friction" created today between this Court and the Executive Branch is many times more serious.

In the face of such concerns, the Court relies heavily on *Ex parte Quirin*, 317 U. S. 1 (1942): "Far from abstaining pending the conclusion of military proceedings, which were ongoing, [in *Quirin*] we convened a special Term to hear the case and expedited our review." *Ante*, at 588. It is likely that the Government in *Quirin*, unlike here, preferred a hasty resolution of the case in this Court, so that it could swiftly execute the sentences imposed, see *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 569 (2004) (SCALIA, J., dissenting). But the Court's reliance on *Quirin* suffers from a more fundamental defect: Once again, it ignores the DTA, which creates an avenue for the consideration of petitioner's claims that did not exist at the time of *Quirin*. Collateral application for habeas review was the *only* vehicle available. And there was no compelling reason to postpone consideration of the *Quirin* application until the termination of military proceedings, because the only cognizable claims presented were gen-

eral challenges to the authority of the commissions that would not be affected by the specific proceedings. See *supra*, at 662–663, n. 2. In the DTA, by contrast, Congress has expanded the scope of Article III review and has channeled it exclusively through a single, postverdict appeal to Article III courts. Because Congress has created a novel unitary scheme of Article III review of military commissions that was absent in 1942, *Quirin* is no longer governing precedent.

I would abstain from exercising our equity jurisdiction, as the Government requests.

* * *

For the foregoing reasons, I dissent.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, and with whom JUSTICE ALITO joins in all but Parts I, II–C–1, and III–B–2, dissenting.

For the reasons set forth in JUSTICE SCALIA's dissent, it is clear that this Court lacks jurisdiction to entertain petitioner's claims, see *ante*, at 655–669. The Court having concluded otherwise, it is appropriate to respond to the Court's resolution of the merits of petitioner's claims because its opinion openly flouts our well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs. The plurality's evident belief that *it* is qualified to pass on the "military necessity," *ante*, at 612, of the Commander in Chief's decision to employ a particular form of force against our enemies is so antithetical to our constitutional structure that it simply cannot go unanswered. I respectfully dissent.

I

Our review of petitioner's claims arises in the context of the President's wartime exercise of his Commander in Chief authority in conjunction with the complete support of Congress. Accordingly, it is important to take measure of the

respective roles the Constitution assigns to the three branches of our Government in the conduct of war.

As I explained in *Hamdi* v. *Rumsfeld*, 542 U. S. 507 (2004), the structural advantages attendant to the Executive Branch—namely, the decisiveness, "'activity, secrecy, and dispatch'" that flow from the Executive's "'unity,'" *id.*, at 581 (dissenting opinion) (quoting The Federalist No. 70, p. 472 (J. Cooke ed. 1961) (A. Hamilton))—led the Founders to conclude that the "President ha[s] primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations." 542 U. S., at 580. Consistent with this conclusion, the Constitution vests in the President "[t]he executive Power," Art. II, § 1, provides that he "shall be Commander in Chief" of the Armed Forces, § 2, and places in him the power to recognize foreign governments, § 3. This Court has observed that these provisions confer upon the President broad constitutional authority to protect the Nation's security in the manner he deems fit. See, *e. g.*, *Prize Cases*, 2 Black 635, 668 (1863) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority"); *Fleming* v. *Page*, 9 How. 603, 615 (1850) (acknowledging that the President has the authority to "employ [the Nation's Armed Forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy").

Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act," and "[s]uch failure of Congress . . . does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." *Dames & Moore* v. *Regan*, 453 U. S. 654, 678 (1981) (quoting *Haig* v. *Agee*, 453 U. S. 280, 291 (1981)). Rather, in these domains,

the fact that Congress has provided the President with broad authorities does not imply—and the Judicial Branch should not infer—that Congress intended to deprive him of particular powers not specifically enumerated. See *Dames & Moore*, 453 U. S., at 678 ("[T]he enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to invite measures on independent presidential responsibility" (internal quotation marks omitted)).

When "the President acts pursuant to an express or implied authorization from Congress," his actions are "'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion . . . rest[s] heavily upon any who might attack it.'" *Id.*, at 668 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 637 (1952) (Jackson, J., concurring)). Accordingly, in the very context that we address today, this Court has concluded that "the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." *Ex parte Quirin*, 317 U. S. 1, 25 (1942).

Under this framework, the President's decision to try Hamdan before a military commission for his involvement with al Qaeda is entitled to a heavy measure of deference. In the present conflict, Congress has authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF), 115 Stat.

224, note following 50 U. S. C. § 1541 (2000 ed., Supp. III) (emphasis added). As a plurality of the Court observed in *Hamdi*, the "capture, detention, and *trial* of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war,'" 542 U. S., at 518 (quoting *Quirin*, *supra*, at 28, 30; emphasis added), and are therefore "an exercise of the 'necessary and appropriate force' Congress has authorized the President to use," *Hamdi*, 542 U. S., at 518; *id.*, at 587 (THOMAS, J., dissenting). *Hamdi*'s observation that military commissions are included within the AUMF's authorization is supported by this Court's previous recognition that "[a]n important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." *In re Yamashita*, 327 U. S. 1, 11 (1946); see also *Quirin*, *supra*, at 28–29; *Madsen* v. *Kinsella*, 343 U. S. 341, 354, n. 20 (1952) ("'[T]he military commission . . . is an institution of the greatest importance in a period of war and should be preserved'" (quoting S. Rep. No. 229, 63d Cong., 2d Sess., 53 (1914) (testimony of Gen. Crowder))).

Although the Court concedes the legitimacy of the President's use of military commissions in certain circumstances, *ante*, at 594, it suggests that the AUMF has no bearing on the scope of the President's power to utilize military commissions in the present conflict, *ibid.* Instead, the Court determines the scope of this power based exclusively on Article 21 of the Uniform Code of Military Justice (UCMJ), 10 U. S. C. § 821, the successor to Article 15 of the Articles of War, which *Quirin* held "authorized trial of offenses against the law of war before [military] commissions." 317 U. S., at 29. As I shall discuss below, Article 21 alone supports the use of commissions here. Nothing in the language of Article 21, however, suggests that it outlines the entire reach of congressional authorization of military commissions in all

conflicts—quite the contrary, the language of Article 21 presupposes the existence of military commissions under an independent basis of authorization.[1] Indeed, consistent with *Hamdi*'s conclusion that the AUMF itself authorizes the trial of unlawful combatants, the original sanction for military commissions historically derived from congressional authorization of "the initiation of war" with its attendant authorization of "the employment of all necessary and proper agencies for its due prosecution." W. Winthrop, Military Law and Precedents 831 (rev. 2d ed. 1920) (hereinafter Winthrop) (emphasis deleted). Accordingly, congressional authorization for military commissions pertaining to the instant conflict derives not only from Article 21 of the UCMJ, but also from the more recent, and broader, authorization contained in the AUMF.[2]

I note the Court's error respecting the AUMF not because it is necessary to my resolution of this case—Hamdan's military commission can plainly be sustained solely under Article 21—but to emphasize the complete congressional sanction of the President's exercise of his Commander in Chief authority to conduct the present war. In such circumstances, as previously noted, our duty to defer to the Executive's military and foreign policy judgment is at its zenith; it does not coun-

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[1] As previously noted, Article 15 of the Articles of War was the predecessor of Article 21 of the UCMJ. Article 21 provides as follows: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." 10 U. S. C. § 821.

[2] Although the President very well may have inherent authority to try unlawful combatants for violations of the law of war before military commissions, we need not decide that question because Congress has authorized the President to do so. Cf. *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 587 (2004) (THOMAS, J., dissenting) (same conclusion respecting detention of unlawful combatants).

tenance the kind of second-guessing the Court repeatedly engages in today. Military and foreign policy judgments

> "'are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.'" *Hamdi*, *supra*, at 582–583 (THOMAS, J., dissenting) (quoting *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948)).

It is within this framework that the lawfulness of Hamdan's commission should be examined.

II

The plurality accurately describes some aspects of the history of military commissions and the prerequisites for their use. Thus, I do not dispute that military commissions have historically been "used in three [different] situations," *ante*, at 595, and that the only situation relevant to the instant case is the use of military commissions "'to seize and subject to disciplinary measures those enemies who . . . have violated the law of war,'" *ante*, at 596 (quoting *Quirin*, *supra*, at 28–29). Similarly, I agree with the plurality that Winthrop's treatise sets forth the four relevant considerations for determining the scope of a military commission's jurisdiction, considerations relating to the (1) time and (2) place of the offense, (3) the status of the offender, and (4) the nature of the offense charged. Winthrop 836–840. The Executive has easily satisfied these considerations here. The plurality's contrary conclusion rests upon an incomplete accounting and an unfaithful application of those considerations.

A

The first two considerations are that a law-of-war military commission may only assume jurisdiction of "offences com-

mitted within the field of the command of the convening commander," and that such offenses "must have been committed within the period of the war." See *id.*, at 836, 837; *ante*, at 597. Here, as evidenced by Hamdan's charging document, the Executive has determined that the theater of the present conflict includes "Afghanistan, Pakistan and other countries" where al Qaeda has established training camps, App. to Pet. for Cert. 64a, and that the duration of that conflict dates back (at least) to Usama bin Laden's August 1996 Declaration of Jihad Against the Americans, *ibid.* Under the Executive's description of the conflict, then, every aspect of the charge, which alleges overt acts in "Afghanistan, Pakistan, Yemen and other countries" taking place from 1996 to 2001, satisfies the temporal and geographic prerequisites for the exercise of law-of-war military commission jurisdiction. *Id.*, at 65a–67a. And these judgments pertaining to the scope of the theater and duration of the present conflict are committed solely to the President in the exercise of his Commander in Chief authority. See *Prize Cases*, 2 Black, at 670 (concluding that the President's Commander in Chief judgment about the nature of a particular conflict was "a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted").

Nevertheless, the plurality concludes that the legality of the charge against Hamdan is doubtful because "Hamdan is charged not with an overt act for which he was caught red-handed in a theater of war . . . but with an *agreement* the inception of which long predated . . . the [relevant armed conflict]." *Ante*, at 612 (emphasis in original). The plurality's willingness to second-guess the Executive's judgments in this context, based upon little more than its unsupported assertions, constitutes an unprecedented departure from the traditionally limited role of the courts with respect to war and an unwarranted intrusion on executive authority. And

even if such second-guessing were appropriate, the plurality's attempt to do so is unpersuasive.

As an initial matter, the plurality relies upon the date of the AUMF's enactment to determine the beginning point for the "period of the war," Winthrop 836–837, thereby suggesting that petitioner's commission does not have jurisdiction to try him for offenses committed prior to the AUMF's enactment. *Ante*, at 598–600, 612. But this suggestion betrays the plurality's unfamiliarity with the realities of warfare and its willful blindness to our precedents. The starting point of the present conflict (or indeed any conflict) is not determined by congressional enactment, but rather by the initiation of hostilities. See *Prize Cases*, *supra*, at 668 (recognizing that war may be initiated by "invasion of a foreign nation," and that such initiation, and the President's response, usually *precedes* congressional action). Thus, Congress' enactment of the AUMF did not mark the beginning of this Nation's conflict with al Qaeda, but instead authorized the President to use force in the midst of an ongoing conflict. Moreover, while the President's "war powers" may not have been activated until the AUMF was passed, *ante*, at 599, n. 31 (emphasis deleted), the date of such activation has never been used to determine the scope of a military commission's jurisdiction.[3] Instead, the traditional rule is that "[o]f-

[3] Even if the formal declaration of war were generally the determinative act in ascertaining the temporal reach of the jurisdiction of a military commission, the AUMF itself is inconsistent with the plurality's suggestion that such a rule is appropriate in this case. See *ante*, at 598–600, 612. The text of the AUMF is backward looking, authorizing the use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." §2(a), 115 Stat. 224. Thus, the President's decision to try Hamdan by military commission—a use of force authorized by the AUMF—for Hamdan's involvement with al Qaeda prior to September 11, 2001, fits comfortably within the framework of the AUMF. In fact, bringing the September 11 conspira-

fenses committed before a formal declaration of war or before the declaration of martial law may be tried by military commission." Green, The Military Commission, 42 Am. J. Int'l L. 832, 848 (1948) (hereinafter Green); see also C. Howland, Digest of Opinions of the Judge-Advocates General of the Army 1067 (1912) (hereinafter Howland) ("A military commission . . . exercising . . . jurisdiction . . . under the laws of war . . . may take cognizance of offenses committed, during the war, *before* the initiation of the military government or martial law" (emphasis in original));[4] cf. *Yamashita*, 327 U. S., at 13 ("The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government"). Consistent with this principle, on facts virtually identical to those here, a military commission tried Julius Otto Kuehn for conspiring with Japanese officials to betray the United States Fleet to the Imperial Japanese Government prior to its attack on Pearl Harbor. Green 848.[5]

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tors to justice is the *primary point* of the AUMF. By contrast, on the plurality's logic, the AUMF would not grant the President the authority to try Usama bin Laden himself for his involvement in the events of September 11, 2001.

[4] The plurality suggests these authorities are inapplicable because nothing in its "analysis turns on the admitted absence of either a formal declaration of war or a declaration of martial law. Our focus instead is on the . . . AUMF." *Ante*, at 599, n. 31. The difference identified by the plurality is purely semantic. Both Green and Howland confirm that the date of the enactment that establishes a legal basis for forming military commissions—whether it be a declaration of war, a declaration of martial law, *or* an authorization to use military force—does not limit the jurisdiction of military commissions to offenses committed after that date.

[5] The plurality attempts to evade the import of this historical example by observing that Kuehn was tried before a martial law commission for a violation of federal espionage statutes. *Ibid.* As an initial matter, the fact that Kuehn was tried before a martial law commission for an offense committed prior to the establishment of martial law provides strong support for the President's contention that he may try Hamdan for offenses

Moreover, the President's determination that the present conflict dates at least to 1996 is supported by overwhelming evidence. According to the State Department, al Qaeda *declared war* on the United States as early as August 1996. See Dept. of State Fact Sheet: Usama bin Ladin (Aug. 21, 1998); Dept. of State Fact Sheet: The Charges against International Terrorist Usama Bin Laden (Dec. 20, 2000); cf. *Prize Cases*, 2 Black, at 668 (recognizing that a state of war exists even if "the declaration of it be *unilateral*" (emphasis in original)). In February 1998, al Qaeda leadership issued another statement ordering the indiscriminate—and, even under the laws of war as applied to legitimate nation-states, plainly illegal—killing of American civilians and military personnel alike. See Jihad Against Jews and Crusaders: World Islamic Front Statement 2 (Feb. 23, 1998), in Y. Alexander & M. Swetnam, Usama bin Laden's al-Qaida: Profile of a Terrorist Network, App. 1B (2001) ("The ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it"). This was

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committed prior to the enactment of the AUMF. Here the AUMF serves the same function as the declaration of martial law in Hawaii in 1941, establishing legal authority for the constitution of military commissions. Moreover, Kuehn was not tried and punished "by statute, but by the laws and usages of war." *United States* v. *Kuehn*, Board of Review 6 (Office of the Military Governor, Hawaii 1942). Indeed, in upholding the imposition of the death penalty, a sentence "not authorized by the Espionage statutes," *id.*, at 5, Kuehn's Board of Review explained that "[t]he fact that persons may be tried and punished . . . by a military commission for committing acts defined as offenses by . . . federal statutes does not mean that such persons are being tried for violations of such . . . statutes; they are, instead, being tried for acts made offenses only by orders of the . . . commanding general," *id.*, at 6. Lastly, the import of this example is not undermined by *Duncan* v. *Kahanamoku*, 327 U. S. 304 (1946). The question before the Court in that case involved only whether "loyal civilians in loyal territory should have their daily conduct governed by military orders," *id.*, at 319; it did "not involve the well-established power of the military to exercise jurisdiction over . . . enemy belligerents," *id.*, at 313.

not mere rhetoric; even before September 11, 2001, al Qaeda was involved in the bombing of the World Trade Center in New York City in 1993, the bombing of the Khobar Towers in Saudi Arabia in 1996, the bombing of the U. S. Embassies in Kenya and Tanzania in 1998, and the attack on the U. S. S. *Cole* in Yemen in 2000. See *id.*, at 1. In response to these incidents, the United States "attack[ed] facilities belonging to Usama bin Ladin's network" as early as 1998. Dept. of State Fact Sheet: Usama bin Ladin (Aug. 21, 1998). Based on the foregoing, the President's judgment—that the present conflict substantially predates the AUMF, extending at least as far back as al Qaeda's 1996 declaration of war on our Nation, and that the theater of war extends at least as far as the localities of al Qaeda's principal bases of operations—is beyond judicial reproach. And the plurality's unsupportable contrary determination merely confirms that "'the Judiciary has neither aptitude, facilities nor responsibility'" for making military or foreign affairs judgments. *Hamdi*, 542 U. S., at 585 (THOMAS, J., dissenting) (quoting *Chicago & Southern Air Lines*, 333 U. S., at 111).

B

The third consideration identified by Winthrop's treatise for the exercise of military commission jurisdiction pertains to the persons triable before such a commission, see *ante*, at 597–598; Winthrop 838. Law-of-war military commissions have jurisdiction over "'[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war,'" *ante*, at 598 (quoting Winthrop 838). They also have jurisdiction over "[i]rregular armed bodies or persons not forming part of the organized forces of a belligerent" "who would not be likely to respect the laws of war." *Id.*, at 783, 784. Indeed, according to Winthrop, such persons are not "within the protection of the laws of war" and were "liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or

upon trial and conviction by military commission." *Id.*, at 784. This consideration is easily satisfied here, as Hamdan is an unlawful combatant charged with joining and conspiring with a terrorist network dedicated to flouting the laws of war. 344 F. Supp. 2d 152, 161 (DC 2004); App. to Pet. for Cert. 63a–67a.

C

The fourth consideration relevant to the jurisdiction of law-of-war military commissions relates to the nature of the offense charged. As relevant here, such commissions have jurisdiction to try "'[v]iolations of the laws and usages of war cognizable by military tribunals only,'" *ante*, at 598 (quoting Winthrop 839). In contrast to the preceding considerations, this Court's precedents establish that judicial review of "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal" is appropriate. *Quirin*, 317 U. S., at 29. However, "charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment." *Yamashita*, 327 U. S., at 17. And whether an offense is a violation of the law of war cognizable before a military commission must be determined pursuant to "the system of common law applied by military tribunals." *Quirin*, *supra*, at 30; *Yamashita*, *supra*, at 8.

The common law of war as it pertains to offenses triable by military commission is derived from the "experience of our wars" and our wartime tribunals, Winthrop 839, and "the laws and usages of war as understood and practiced by the civilized nations of the world," 11 Op. Atty. Gen. 297, 310 (1865). Moreover, the common law of war is marked by two important features. First, as with the common law generally, it is flexible and evolutionary in nature, building upon the experience of the past and taking account of the exigencies of the present. Thus, "[t]he law of war, like every other code of laws, declares what shall not be done, and does not say what may be done. The legitimate use of the great

power of war, or rather the prohibitions upon the use of that power, increase or diminish as the necessity of the case demands." *Id.*, at 300. Accordingly, this Court has recognized that the "jurisdiction" of "our common-law war courts" has not been "prescribed by statute," but rather "has been adapted in each instance to the need that called it forth." *Madsen*, 343 U. S., at 346–348. Second, the common law of war affords a measure of respect for the judgment of military commanders. Thus, "[t]he commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the law and usage of war." 11 Op. Atty. Gen., at 305. In recognition of these principles, Congress has generally "'left it to the President, and the military commanders representing him, to employ the commission, *as occasion may require*, for the investigation and punishment of violations of the laws of war.'" *Madsen*, *supra*, at 347, n. 9 (quoting Winthrop 831; emphasis added).

In one key respect, the plurality departs from the proper framework for evaluating the adequacy of the charge against Hamdan under the laws of war. The plurality holds that where, as here, "neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent [establishing whether an offense is triable by military commission] must be plain and unambiguous." *Ante*, at 602. This is a pure contrivance, and a bad one at that. It is contrary to the presumption we acknowledged in *Quirin*, namely, that the actions of military commissions are "not to be set aside by the courts without the *clear conviction* that they are" unlawful, 317 U. S., at 25 (emphasis added). It is also contrary to *Yamashita*, which recognized the legitimacy of that military commission notwithstanding a substantial disagreement pertaining to whether Yamashita had been charged with a violation of the law of war. Compare 327 U. S., at 17 (noting that the allegations were "ade-

quat[e]" and "need not be stated with . . . precision"), with *id.*, at 35 (Murphy, J., dissenting) (arguing that the charge was inadequate). Nor does it find support from the separation-of-powers authority cited by the plurality. Indeed, Madison's praise of the separation of powers in The Federalist No. 47, quoted *ante*, at 602, if it has any relevance at all, merely highlights the illegitimacy of today's judicial intrusion onto core executive prerogatives in the waging of war, where executive competence is at its zenith and judicial competence at its nadir.

The plurality's newly minted clear-statement rule is also fundamentally inconsistent with the nature of the common law which, by definition, evolves and develops over time and does not, in all cases, "say what may be done." 11 Op. Atty. Gen., at 300. Similarly, it is inconsistent with the nature of warfare, which also evolves and changes over time, and for which a flexible, evolutionary common-law system is uniquely appropriate.[6] Though the charge against Hamdan easily satisfies even the plurality's manufactured rule, see *infra*, at 692–706, the plurality's inflexible approach has dangerous implications for the Executive's ability to discharge his duties as Commander in Chief in future cases. We should undertake to determine whether an unlawful combatant has been charged with an offense against the law of war with an understanding that the common law of war is flexible, responsive to the exigencies of the present conflict, and deferential to the judgment of military commanders.

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[6] Indeed, respecting the present conflict, the President has found that "the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm—ushered in not by us, but by terrorists—requires new thinking in the law of war." App. 34–35. Under the Court's approach, the President's ability to address this "new paradigm" of inflicting death and mayhem would be completely frozen by rules developed in the context of conventional warfare.

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Under either the correct, flexible approach to evaluating the adequacy of Hamdan's charge, or under the plurality's new, clear-statement approach, Hamdan has been charged with conduct constituting two distinct violations of the law of war cognizable before a military commission: membership in a war-criminal enterprise and conspiracy to commit war crimes. The charging section of the indictment alleges both that Hamdan "willfully and knowingly joined an enterprise of persons who shared a common criminal purpose," App. to Pet. for Cert. 65a, and that he "conspired and agreed with [al Qaeda] to commit . . . offenses triable by military commission," *ibid.*[7]

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[7] It is true that both of these separate offenses are charged under a single heading entitled "CHARGE: CONSPIRACY," App. to Pet. for Cert. 65a. But that does not mean that they must be treated as a single crime, when the law of war treats them as separate crimes. As we acknowledged in *In re Yamashita*, 327 U. S. 1 (1946), "charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment." *Id.*, at 17; cf. W. Birkhimer, Military Government and Martial Law 536 (3d rev. ed. 1914) (hereinafter Birkhimer) ("[I]t would be extremely absurd to expect the same precision in a charge brought before a court-martial as is required to support a conviction before a justice of the peace" (internal quotation marks omitted)).

Nevertheless, the plurality contends that Hamdan was "not actually charged," *ante*, at 601, n. 32 (emphasis deleted), with being a member in a war-criminal organization. But that position is demonstrably wrong. Hamdan's charging document expressly *charges* that he "willfully and knowingly joined an enterprise of persons who shared a common criminal purpose." App. to Pet. for Cert. 65a. Moreover, the plurality's contention that we may only look to the label affixed to the charge to determine if the charging document alleges an offense triable by military commission is flatly inconsistent with its treatment of the Civil War cases—where it accepts as valid charges that did not appear in the heading or title of the charging document, or even the listed charge itself, but only in the supporting specification. See, *e. g.*, *ante*, at 609 (discussing the military commission trial of Wirz). For example, in the Wirz case, Wirz was charged

The common law of war establishes that Hamdan's willful and knowing membership in al Qaeda is a war crime chargeable before a military commission. Hamdan, a confirmed enemy combatant and member or affiliate of al Qaeda, has been charged with willfully and knowingly joining a group (al Qaeda) whose purpose is "to support violent attacks against property and nationals (both military and civilian) of the United States." *Id.*, at 64a; 344 F. Supp. 2d, at 161. Moreover, the allegations specify that Hamdan joined and maintained his relationship with al Qaeda even though he "believed that Usama bin Laden and his associates were involved in the attacks on the U. S. Embassies in Kenya and Tanzania in August 1998, the attack on the USS COLE in October 2000, and the attacks on the United States on September 11, 2001." App. to Pet. for Cert. 65a. These allegations, against a confirmed unlawful combatant, are alone sufficient to sustain the jurisdiction of Hamdan's military commission.

For well over a century it has been established that "to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; *the offence is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offence, but make the reasons, and sufficient reasons they are, why such banditti are denounced by the laws of*

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with conspiring to violate the laws of war, and that charge was supported with allegations that he personally committed a number of atrocities. The plurality concludes that military commission jurisdiction was appropriate in that case not based upon the charge of conspiracy, but rather based upon the allegations of various atrocities in the specification which were *not* separately charged. *Ante*, at 609. Just as these atrocities, not separately charged, were independent violations of the law of war supporting Wirz's trial by military commission, so too here Hamdan's membership in al Qaeda and his provision of various forms of assistance to al Qaeda's top leadership are independent violations of the law of war supporting his trial by military commission.

war." 11 Op. Atty. Gen., at 312 (emphasis added).[8] In other words, unlawful combatants, such as Hamdan, violate the law of war merely by joining an organization, such as al Qaeda, whose principal purpose is the "killing [and] disabling . . . of peaceable citizens or soldiers." Winthrop 784; see also 11 Op. Atty. Gen., at 314 ("A bushwhacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war"). This conclusion is unsurprising, as it is a "cardinal principle of the law of war . . . that the civilian population must enjoy complete immunity." 4 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 3 (J. Pictet gen. ed. 1958). "Numerous instances of trials, for 'Violation of the laws of war,' of offenders of this description, are published in the General Orders of the years 1862 to 1866." Winthrop 784, and n. 57.[9] Accordingly, on this basis alone,

[8] These observations respecting the law of war were made by the Attorney General in defense of the military commission trial of the Lincoln conspirators. As the foregoing quoted portion of that opinion makes clear, the Attorney General did not, as the plurality maintains, "trea[t] the charge as if it alleged the substantive offense of assassination." *Ante*, at 604, n. 35. Rather, he explained that the conspirators' "high offence against the laws of war" was "complete" when their band was "organized or joined," and did not depend upon "atrocities committed by such a band." 11 Op. Atty. Gen. 297, 312 (1865). Moreover, the Attorney General's conclusions specifically refute the plurality's unsupported suggestion that I have blurred the line between "those categories of 'offender' who may be tried by military commission . . . with the 'offenses' that may be so tried." *Ante*, at 601, n. 32.

[9] The General Orders establishing the jurisdiction for military commissions during the Civil War provided that such offenses were violations of the laws of war cognizable before military commissions. See H. R. Doc. No. 65, 55th Cong., 3d Sess., 164 (1894) ("[P]ersons charged with the violation of the laws of war as spies, bridge-burners, marauders, &c., will . . . be held for trial under such charges"); *id.*, at 234 ("[T]here are numerous rebels . . . that . . . furnish the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents are banding together in several of the interior counties for the purpose of assisting

"the allegations of [Hamdan's] charge, tested by any reasonable standard, adequately allege a violation of the law of war." *Yamashita*, 327 U. S., at 17.

The conclusion that membership in an organization whose purpose is to violate the laws of war is an offense triable by military commission is confirmed by the experience of the

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the enemy to rob, to maraud and to lay waste the country. *All such persons are by the laws of war in every civilized country liable to capital punishment*" (emphasis added)). Numerous trials were held under this authority. See, *e. g.*, U. S. War Dept., General Court Martial Order No. 51, p. 1 (1866) (hereinafter G. C. M. O.) (indictment in the military commission trial of James Harvey Wells charged "'[b]eing a guerrilla'" and specified that he "'willfully . . . [took] up arms as a guerrilla marauder, and did join, belong to, act and co-operate with guerrillas'"); G. C. M. O. No. 108, Head-Quarters Dept. of Kentucky, p. 1 (1865) (indictment in the military commission trial of Henry C. Magruder charged "'[b]eing a guerrilla'" and specified that he "'unlawfully, and of his own wrong, [took] up arms as a guerrilla marauder, and did join, belong to, act, and co-operate with a band of guerrillas'"); G. C. M. O. No. 41, p. 1 (1864) (indictment in the military commission trial of John West Wilson charged that Wilson "'did take up arms as an insurgent and guerrilla against the laws and authorities of the United States, and did join and co-operate with an armed band of insurgents and guerrillas who were engaged in plundering the property of peaceable citizens . . . in violation of the laws and customs of war'"); G. C. M. O. No. 153, p. 1 (1864) (indictment in the military commission trial of Simeon B. Kight charged that defendant was "'a guerrilla, and has been engaged in an unwarrantable and barbarous system of warfare against citizens and soldiers of the United States'"); G. C. M. O. No. 93, pp. 3–4 (1864) (indictment in the military commission trial of Francis H. Norvel charged "'[b]eing a guerrilla'" and specified that he "'unlawfully and by his own wrong, [took] up arms as an outlaw, guerrilla, and bushwhacker, against the lawfully constituted authorities of the United States government'"); *id.*, at 9 (indictment in the military commission trial of James A. Powell charged "'[t]ransgression of the laws and customs of war'" and specified that he "'[took] up arms in insurrection as a military insurgent, and did join himself to and, in arms, consort with . . . a rebel enemy of the United States, and the leader of a band of insurgents and armed rebels'"); *id.*, at 10–11 (indictment in the military commission trial of Joseph Overstreet charged "'[b]eing a guerrilla'" and specified that he "'did join, belong to, consort and co-operate with a band of guerrillas, insurgents, outlaws, and public robbers'").

military tribunals convened by the United States at Nuremberg. Pursuant to Article 10 of the Charter of the International Military Tribunal (IMT), the United States convened military tribunals "to bring individuals to trial for membership" in "a group or organization . . . declared criminal by the [IMT]." 1 Trials of War Criminals Before the Nuernberg Military Tribunals, p. XII, Art. 10 (hereinafter Trials). The IMT designated various components of four Nazi groups—the Leadership Corps, Gestapo, SD, and SS—as criminal organizations. 22 IMT, Trial of the Major War Criminals 505, 511, 517 (1948); see also T. Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir 584–585 (1992). "[A] member of [such] an organization [could] be . . . convicted of the crime of membership and be punished for that crime by death." 22 IMT, at 499. Under this authority, the United States Military Tribunal at Nuremberg convicted numerous individuals for the act of knowing and voluntary membership in these organizations. For example, in Military Tribunal Case No. 1, *United States* v. *Brandt*, Karl Brandt, Karl Gebhardt, Rudolf Brandt, Joachim Mrugowsky, Wolfram Sievers, Viktor Brack, and Waldemar Hoven were convicted and sentenced to death for the crime of, *inter alia*, membership in an organization declared criminal by the IMT; Karl Genzken and Fritz Fischer were sentenced to life imprisonment for the same; and Helmut Poppendick was convicted of no other offense than membership in a criminal organization and sentenced to a 10-year term of imprisonment. 2 Trials 180–300. This Court denied habeas relief, 333 U. S. 836 (1948), and the executions were carried out at Landsberg prison on June 2, 1948. 2 Trials 330.

Moreover, the Government has alleged that Hamdan was not only a member of al Qaeda while it was carrying out terrorist attacks on civilian targets in the United States and abroad, but also that Hamdan aided and assisted al Qaeda's top leadership by supplying weapons, transportation, and other services. App. to Pet. for Cert. 65a–67a. These alle-

gations further confirm that Hamdan is triable before a law-of-war military commission for his involvement with al Qaeda. See H. R. Doc. No. 65, 55th Cong., 3d Sess., 234 (1894) ("[T]here are numerous rebels . . . that . . . furnish the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents are banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maraud and to lay waste [to] the country. *All such persons are by the laws of war in every civilized country liable to capital punishment*" (emphasis added)); Winthrop 840 (including in the list of offenses triable by law-of-war military commissions "dealing with . . . enemies, or furnishing them with money, arms, provisions, medicines, & c.").[10] Undoubtedly, the conclusion that such conduct violates the law of war led to the enactment of Article 104 of the UCMJ, which provides that "[a]ny person who . . . aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things . . . shall suffer death or such other punishment as a court-martial or military commission may direct." 10 U. S. C. § 904.

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Separate and apart from the offense of joining a contingent of "uncivilized combatants who [are] not . . . likely to respect the laws of war," Winthrop 784, Hamdan has been charged with "conspir[ing] and agree[ing] with . . . the al Qaida organization . . . to commit . . . offenses triable by military commission," App. to Pet. for Cert. 65a. Those offenses include "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism." *Ibid.* This,

[10] Even if the plurality were correct that a membership offense must be accompanied by allegations that the "defendant 'took up arms,'" *ante*, at 601, n. 32, that requirement has easily been satisfied here. Not only has Hamdan been charged with providing assistance to top al Qaeda leadership (itself an offense triable by military commission), he has also been charged with receiving weapons training at an al Qaeda camp. App. to Pet. for Cert. 66a–67a.

too, alleges a violation of the law of war triable by military commission.

"[T]he experience of our wars," Winthrop 839, is rife with evidence that establishes beyond any doubt that conspiracy to violate the laws of war is itself an offense cognizable before a law-of-war military commission. World War II provides the most recent examples of the use of American military commissions to try offenses pertaining to violations of the laws of war. In that conflict, the orders establishing the jurisdiction of military commissions in various theaters of operation provided that conspiracy to violate the laws of war was a cognizable offense. See Letter, General Headquarters, United States Army Forces, Pacific (Sept. 24, 1945), Record in *Yamashita* v. *Styer*, O. T. 1945, No. 672, pp. 14, 16 (Exh. F) (Order respecting the "Regulations Governing the Trial of War Criminals" provided that "participation in a common plan or conspiracy to accomplish" various offenses against the law of war was cognizable before military commissions); 1 U. N. War Crimes Commission, Law Reports of Trials of War Criminals 114–115 (1947) (reprint 1997) (hereinafter U. N. Commission) (recounting that the orders establishing World War II military commissions in the Pacific and China included "participation in a common plan or conspiracy" pertaining to certain violations of the laws of war as an offense triable by military commission). Indeed, those orders authorized trial by military commission of participation in a conspiracy to commit "'murder . . . or other inhumane acts . . . against any civilian population,'" *id.*, at 114, which is precisely the offense Hamdan has been charged with here. And conspiracy to violate the laws of war was charged in the highest profile case tried before a World War II military commission, see *Quirin*, 317 U. S., at 23, and on numerous other occasions. See, *e. g.*, *Colepaugh* v. *Looney*, 235 F. 2d 429, 431 (CA10 1956); Green 848 (describing the conspiracy trial of Julius Otto Kuehn).

To support its contrary conclusion, *ante*, at 600, the plurality attempts to evade the import of *Quirin* (and the other World War II authorities) by resting upon this Court's failure to address the sufficiency of the conspiracy charge in the *Quirin* case, *ante*, at 605–607. But the common law of war cannot be ascertained from this Court's failure to pass upon an issue, or indeed to even mention the issue in its opinion;[11] rather, it is ascertained by the practice and usage of war. Winthrop 839; *supra*, at 689–690.

The Civil War experience provides further support for the President's conclusion that conspiracy to violate the laws of war is an offense cognizable before law-of-war military commissions. Indeed, in the highest profile case to be tried before a military commission relating to that war, namely, the trial of the men involved in the assassination of President Lincoln, the charge provided that those men had "combin[ed], confederat[ed], and conspir[ed] . . . to kill and murder" President Lincoln. G. C. M. O. No. 356 (1865), reprinted in H. R. Doc. No. 314, 55th Cong., 3d Sess., 696 (1899) (hereinafter G. C. M. O. No. 356).[12]

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[11] The plurality recounts the respective claims of the parties in *Quirin* pertaining to this issue and cites the United States Reports. *Ante*, at 605. But the claims of the parties are not included in the opinion of the Court, but rather in the sections of the Reports entitled "Argument for Petitioners" and "Argument for Respondent." See 317 U. S., at 6–17.

[12] The plurality concludes that military commission jurisdiction was appropriate in the case of the Lincoln conspirators because they were charged with "'maliciously, unlawfully, and traitorously murdering the said Abraham Lincoln,'" *ante*, at 604, n. 35. But the sole charge filed in that case alleged conspiracy, and the allegations pertaining to "maliciously, unlawfully, and traitorously murdering the said Abraham Lincoln" were not charged or labeled as separate offenses, but rather as overt acts "in pursuance of and in prosecuting said malicious, unlawful, and traitorous *conspiracy*." G. C. M. O. No. 356, at 696 (emphasis added). While the plurality contends the murder of President Lincoln was charged as a distinct separate offense, the foregoing quoted language of the charging document unequivocally establishes otherwise. Moreover, though I agree that the allegations pertaining to these overt acts provided an independ-

In addition to the foregoing high-profile example, Winthrop's treatise enumerates numerous Civil War military commission trials for conspiracy to violate the law of war. Winthrop 839, n. 5. The plurality attempts to explain these examples away by suggesting that the conspiracies listed by Winthrop are best understood as "a species of compound offense," namely, violations both of the law of war and ordinary criminal laws, rather than "stand-alone offense[s] against the law of war." *Ante*, at 608 (citing, as an example, murder in violation of the laws of war). But the fact that, for example, conspiracy to commit murder can at the same time violate ordinary criminal laws and the law of war, so that it is "a combination of the two species of offenses," Howland 1071, does not establish that a military commission would not have jurisdiction to try that crime solely on the basis that it was a violation of the law of war. Rather, if anything, and consistent with the principle that the common law of war is flexible and affords some level of deference to the judgments of military commanders, it establishes that military commissions would have the discretion to try the offense as (1) one against the law of war, or (2) one against the ordinary criminal laws, or (3) both.

In any event, the plurality's effort to avoid the import of Winthrop's footnote through the smokescreen of its "compound offense" theory, *ante*, at 607–608, cannot be reconciled with the particular charges that sustained military commission jurisdiction in the cases that Winthrop cites. For ex-

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ent basis for the military commission's jurisdiction in that case, that merely confirms the propriety of examining all the acts alleged—whether or not they are labeled as separate offenses—to determine if a defendant has been charged with a violation of the law of war. As I have already explained, Hamdan has been charged with violating the law of war not only by participating in a conspiracy to violate the law of war, but also by joining a war-criminal enterprise and by supplying provisions and assistance to that enterprise's top leadership.

ample, in the military commission trial of Henry Wirz, Charge I provided that he had been

> "[m]aliciously, willfully, and traitorously . . . *combining, confederating, and conspiring,* together [with various other named and unnamed co-conspirators], to injure the health and destroy the lives of soldiers in the military service of the United States, then held and being prisoners of war within the lines of the so-called Confederate States, and in the military prisons thereof, to the end that the armies of the United States might be weakened and impaired, *in violation of the laws and customs of war.*" G. C. M. O. No. 607 (1865), reprinted in H. R. Doc. No. 314, at 785 (emphasis added).

Likewise, in the military commission trial of Leger Grenfel, Charge I accused Grenfel of "*[c]onspiring, in violation of the laws of war,* to release rebel prisoners of war confined by authority of the United States at Camp Douglas, near Chicago, Ill." G. C. M. O. No. 452 (1865), reprinted in H. R. Doc. No. 314, at 724 (emphasis added);[13] see also G. C. M. O.

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[13] The plurality's attempt to undermine the significance of these cases is unpersuasive. The plurality suggests the Wirz case is not relevant because the specification supporting his conspiracy charge alleged that he "*personally committed* a number of atrocities." *Ante,* at 609. But this does not establish that conspiracy to violate the laws of war, the very crime with which Wirz was charged, is not itself a violation of the law of war. Rather, at best, it establishes that in addition to conspiracy Wirz violated the laws of war by committing various atrocities, just as Hamdan violated the laws of war not only by conspiring to do so, but also by joining al Qaeda and providing provisions and services to its top leadership. Moreover, the fact that Wirz was charged with overt acts that are more severe than the overt acts with which Hamdan has been charged does not establish that conspiracy is not an offense cognizable before military commission; rather it merely establishes that Wirz's offenses may have been comparably worse than Hamdan's offenses.

The plurality's claim that the charge against Leger Grenfel supports its compound offense theory is similarly unsupportable. The plurality does not, and cannot, dispute that Grenfel was charged with conspiring to vio-

No. 41, p. 20 (1864) (indictment in the military commission trial of Robert Louden charged "'[c]onspiring with the rebel enemies of the United States to embarrass and impede the military authorities in the suppression of the existing rebellion, by the burning and destruction of steamboats and means of transportation on the Mississippi river'"). These examples provide incontrovertible support for the President's conclusion that the common law of war permits military commission trials for conspiracy to violate the law of war. And they specifically contradict the plurality's conclusion to the contrary, thereby easily satisfying its requirement that the Government "make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war." *Ante*, at 603.[14]

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late the laws of war by releasing rebel prisoners—a charge that bears no relation to a crime "ordinarily triable in civilian courts." *Ante*, at 609, n. 37. Tellingly, the plurality does not reference or discuss this charge, but instead refers to the conclusion of Judge Advocate Holt that Grenfel also "'united himself with traitors and malefactors for the overthrow of our Republic in the interest of slavery.'" *Ante*, at 610, n. 37 (quoting H. R. Doc. No. 314, at 689). But Judge Advocate Holt's observation provides no support for the plurality's conclusion, as it does not discuss the charges that sustained military commission jurisdiction, much less suggest that such charges were not violations of the law of war.

[14] The plurality contends that international practice—including the practice of the IMT at Nuremberg—supports its conclusion that conspiracy is not an offense triable by military commission because "'[t]he Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war.'" *Ante*, at 611 (quoting T. Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir 36 (1992)). But while the IMT did not criminalize all conspiracies to violate the law of war, it did criminalize "participation in a common plan or conspiracy" to wage aggressive war. See 1 Trials, at XI–XII, Art. 6(a). Moreover, the World War II military tribunals of several European nations recognized conspiracy to violate the laws of war as an offense triable before military commissions. See 15 U. N. Commission 90–91 (noting that the French Military Tribunal at Marseilles found Henri Georges Stadelhofer "guilty of the crime of *association de malfaiteurs*," namely, of "'having formed with various members of the

The plurality further contends, in reliance upon Winthrop, that conspiracy is not an offense cognizable before a law-of-war military commission because "it is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt." *Ante*, at 604. But Winthrop does not support the plurality's conclusion. The passage in Winthrop cited by the plurality states only that "the jurisdiction of the military commission should be restricted to cases of offence consisting in *overt acts, i. e.* in unlawful commissions or actual attempts to commit, and not in intentions merely." Winthrop 841 (emphasis in original). This passage would be helpful to the plurality if its subject were "conspiracy," rather than the "jurisdiction of the military commission." Winthrop is not speaking here of the requirements for a conspiracy charge, but of the requirements for *all* charges. Intentions do not suffice. An unlawful act—such as committing the crime of conspiracy—is necessary. Winthrop says nothing to exclude either conspiracy or membership in a criminal enterprise, both of which go beyond "intentions merely" and "consis[t of] *overt acts, i. e.* . . . unlawful commissions or actual attempts to commit," and both of which are *expressly* recognized by Winthrop as crimes against the law of war triable by military commissions. *Id.*, at 784; *id.*, at 839, and n. 5, 840. Indeed, the

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German Gestapo an association with the aim of preparing or committing crimes against persons or property, without justification under the laws and usages of war' "); 11 *id.*, at 98 (noting that the Netherlands' military tribunals were authorized to try conspiracy to violate the laws of war). Thus, the European legal systems' approach to domestic conspiracy law has not prevented European nations from recognizing conspiracy offenses as violations of the law of war. This is unsurprising, as the law of war is derived not from domestic law but from the wartime practices of civilized nations, including the United States, which has consistently recognized that conspiracy to violate the laws of war is an offense triable by military commission.

commission of an *"overt ac[t]"* is the traditional requirement for the completion of the crime of conspiracy, and the charge against Hamdan alleges numerous such overt acts. App. to Pet. for Cert. 65a. The plurality's approach, unsupported by Winthrop, requires that any overt act to further a conspiracy must *itself* be a completed war crime *distinct from conspiracy*—which merely begs the question the plurality sets out to answer, namely, whether conspiracy itself may constitute a violation of the law of war. And, even the plurality's unsupported standard is satisfied here. Hamdan has been charged with the overt acts of providing protection, transportation, weapons, and other services to the enemy, *id.*, at 65a–67a, acts which in and of themselves are violations of the laws of war. See *supra*, at 696–697; Winthrop 839–840.

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Ultimately, the plurality's determination that Hamdan has not been charged with an offense triable before a military commission rests not upon any historical example or authority, but upon the plurality's raw judgment of the "inability on the Executive's part here to satisfy the most basic precondition . . . for establishment of military commissions: military necessity." *Ante*, at 612. This judgment starkly confirms that the plurality has appointed itself the ultimate arbiter of what is quintessentially a policy and military judgment, namely, the appropriate military measures to take against those who "aided the terrorist attacks that occurred on September 11, 2001." AUMF §2(a), 115 Stat. 224. The plurality's suggestion that Hamdan's commission is illegitimate because it is not dispensing swift justice on the battlefield is unsupportable. *Ante*, at 607. Even a cursory review of the authorities confirms that law-of-war military commissions have wide-ranging jurisdiction to try offenses against the law of war in exigent and nonexigent circumstances alike. See, *e. g.*, Winthrop 839–840; see also *Yamashita*, 327 U. S., at 5 (military commission trial after the cessa-

tion of hostilities in the Philippines); *Quirin*, 317 U. S. 1 (military commission trial in Washington, D. C.). Traditionally, retributive justice for heinous war crimes is as much a "military necessity" as the "demands" of "military efficiency" touted by the plurality, and swift military retribution is precisely what Congress authorized the President to impose on the September 11 attackers in the AUMF.

Today a plurality of this Court would hold that conspiracy to massacre innocent civilians does not violate the laws of war. This determination is unsustainable. The judgment of the political branches that Hamdan, and others like him, must be held accountable before military commissions for their involvement with and membership in an unlawful organization dedicated to inflicting massive civilian casualties is supported by virtually every relevant authority, including all of the authorities invoked by the plurality today. It is also supported by the nature of the present conflict. We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy, who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001, and who has boasted of sending suicide bombers into civilian gatherings, has proudly distributed videotapes of beheadings of civilian workers, and has tortured and dismembered captured American soldiers. But according to the plurality, when our Armed Forces capture those who are plotting terrorist atrocities like the bombing of the Khobar Towers, the bombing of the U. S. S. *Cole*, and the attacks of September 11—even if their plots are advanced to the very brink of fulfillment—our military cannot charge those criminals with any offense against the laws of war. Instead, our troops must catch the terrorists "redhanded," *ante*, at 612, in the midst of *the attack itself*, in order to bring them to justice. Not only is this conclusion fundamentally inconsistent with the cardinal principle of the law of war, namely, protecting noncombatants, but it would sorely hamper the President's ability to confront and defeat a new and deadly enemy.

After seeing the plurality overturn longstanding precedents in order to seize jurisdiction over this case, *ante*, at 656–658 (SCALIA, J., dissenting), and after seeing them disregard the clear prudential counsel that they abstain in these circumstances from using equitable powers, *ante*, at 672–678, it is no surprise to see them go on to overrule one after another of the President's judgments pertaining to the conduct of an ongoing war. Those Justices who today disregard the Commander in Chief's wartime decisions, only 10 days ago deferred to the judgment of the Corps of Engineers with regard to a matter much more within the competence of lawyers, upholding that agency's wildly implausible conclusion that a storm drain is a tributary of the waters of the United States. See *Rapanos* v. *United States*, 547 U. S. 715 (2006). It goes without saying that there is much more at stake here than storm drains. The plurality's willingness to second-guess the determination of the political branches that these conspirators must be brought to justice is both unprecedented and dangerous.

III

The Court holds that even if "the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed" because of its failure to comply with the terms of the UCMJ and the four Geneva Conventions signed in 1949. *Ante*, at 613. This position is untenable.

A

As with the jurisdiction of military commissions, the procedure of such commissions "has [not] been prescribed by statute," but "has been adapted in each instance to the need that called it forth." *Madsen*, 343 U. S., at 347–348. Indeed, this Court has concluded that "[i]n the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe

the jurisdiction and procedure of military commissions." *Id.*, at 348. This conclusion is consistent with this Court's understanding that military commissions are "our common-law war courts." *Id.*, at 346–347.[15] As such, "[s]hould the conduct of those who compose martial-law tribunals become [a] matter of judicial determination subsequently before the civil courts, those courts will give great weight to the opinions of the officers as to what the customs of war in any case justify and render necessary." Birkhimer 534.

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[15] Though it does not constitute a basis for any holding of the Court, the Court maintains that, as a "general rule," "the procedures governing trials by military commission historically have been the same as those governing courts-martial." *Ante*, at 617. While it is undoubtedly true that military commissions have invariably employed most of the procedures employed by courts-martial, that is not a requirement. See Winthrop 841 ("[M]ilitary commissions . . . are commonly conducted according to the rules and forms governing courts-martial. These war-courts are indeed more summary in their action than are the courts held under the Articles of war, and . . . their proceedings . . . will not be rendered *illegal* by the omission of details required upon trials by courts-martial" (emphasis in original; footnotes omitted)); 1 U. N. Commission 116–117 ("The [World War II] Mediterranean Regulations (No. 8) provide that Military Commissions shall conduct their proceedings as may be deemed necessary for full and fair trial, having regard for, *but not being bound by*, the rules of procedure prescribed for General Courts Martial" (emphasis added)); *id.*, at 117 ("In the [World War II] European directive it is stated . . . that Military Commissions shall have power to make, as occasion requires, such rules for the conduct of their proceedings consistent with the powers of such Commissions, and with the rules of procedure . . . as are deemed necessary for a full and fair trial of the accused, having regard for, without being bound by, the rules of procedure and evidence prescribed for General Courts Martial"). Moreover, such a requirement would conflict with the settled understanding of the flexible and responsive nature of military commissions and the President's wartime authority to employ such tribunals as he sees fit. See Birkhimer 537–538 ("[M]ilitary commissions may so vary their procedure as to adapt it to any situation, and may extend their powers to any necessary degree. . . . The military commander decides upon the character of the military tribunal which is suited to the occasion . . . and his decision is final").

The Court nevertheless concludes that at least one provision of the UCMJ amounts to an attempt by Congress to limit the President's power. This conclusion is not only contrary to the text and structure of the UCMJ, but it is also inconsistent with precedent of this Court. Consistent with *Madsen*'s conclusion pertaining to the common-law nature of military commissions and the President's discretion to prescribe their procedures, Article 36 of the UCMJ authorizes the President to establish procedures for military commissions "which shall, *so far as he considers practicable*, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U. S. C. §836(a) (emphasis added). Far from constraining the President's authority, Article 36 recognizes the President's prerogative to depart from the procedures applicable in criminal cases whenever *he alone* does not deem such procedures "practicable." While the procedural regulations promulgated by the Executive must not be "contrary to" the UCMJ, only a few provisions of the UCMJ mention "military commissions," see *ante*, at 621, n. 49, and there is no suggestion that the procedures to be employed by Hamdan's commission implicate any of those provisions.

Notwithstanding the foregoing, the Court concludes that Article 36(b) of the UCMJ, 10 U. S. C. §836(b), which provides that "[a]ll rules and regulations made under this article shall be uniform insofar as practicable," *ante*, at 620, requires the President to employ the same rules and procedures in military commissions as are employed by courts-martial "'*insofar as practicable*,'" *ante*, at 622. The Court further concludes that Hamdan's commission is unlawful because the President has not explained why it is not practicable to apply the same rules and procedures to Hamdan's commission as would be applied in a trial by court-martial. *Ante*, at 623–624.

This interpretation of § 836(b) is unconvincing. As an initial matter, the Court fails to account for our cases interpreting the predecessor to Article 21 of the UCMJ—Article 15 of the Articles of War—which provides crucial context that bears directly on the proper interpretation of Article 36(b). Article 15 of the Articles of War provided that:

> "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals." 41 Stat. 790.

In *Yamashita*, this Court concluded that Article 15 of the Articles of War preserved the President's unfettered authority to prescribe military commission procedure. The Court explained, "[b]y thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction . . . to *any use* of the military commission contemplated by the common law of war." 327 U. S., at 20 (emphasis added);[16] see also *Quirin*, 317 U. S., at 28; *Madsen*, 343 U. S., at 355. In reaching this conclusion, this Court treated as authoritative the congressional testimony of Judge Advo-

[16] The Court suggests that Congress' amendment to Article 2 of the UCMJ, providing that the UCMJ applies to "persons within an area leased by or otherwise reserved or acquired for the use of the United States," 10 U. S. C. § 802(a)(12), deprives *Yamashita*'s conclusion respecting the President's authority to promulgate military commission procedures of its "precedential value." *Ante*, at 620. But this merely begs the question of the scope and content of the remaining provisions of the UCMJ. Nothing in the additions to Article 2, or any other provision of the UCMJ, suggests that Congress has disturbed this Court's unequivocal interpretation of Article 21 as preserving the common-law status of military commissions and the corresponding authority of the President to set their procedures pursuant to his Commander in Chief powers. See *Quirin*, 317 U. S., at 28; *Yamashita*, 327 U. S., at 20; *Madsen* v. *Kinsella*, 343 U. S. 341, 355 (1952).

cate General Crowder, who testified that Article 15 of the Articles of War was enacted to preserve the military commission as "'our common-law war court.'" *Yamashita*, *supra*, at 19, n. 7. And this Court recognized that Article 15's preservation of military commissions as common-law war courts preserved the President's Commander in Chief authority to both "establish" military commissions and to "prescribe [their] procedure[s]." *Madsen*, 343 U. S., at 348; *id.*, at 348–349 (explaining that Congress had "refrain[ed] from legislating" in the area of military commission procedures, in "contras[t] with its traditional readiness to . . . prescrib[e], with particularity, the jurisdiction and procedure of United States courts-martial"); cf. Green 834 ("The military commission exercising jurisdiction under common law authority is usually appointed by a superior military commander and is limited in its procedure only by the will of that commander. Like any other common law court, in the absence of directive of superior authority to the contrary, the military commission is free to formulate its own rules of procedure").

Given these precedents, the Court's conclusion that Article 36(b) requires the President to apply the same rules and procedures to military commissions as are applicable to courts-martial is unsustainable. When Congress codified Article 15 of the Articles of War in Article 21 of the UCMJ it was "presumed to be aware of . . . and to adopt" this Court's interpretation of that provision as preserving the common-law status of military commissions, inclusive of the President's unfettered authority to prescribe their procedures. *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978). The Court's conclusion that Article 36(b) repudiates this settled meaning of Article 21 is not based upon a specific textual reference to military commissions, but rather on a one-sentence subsection providing that "[a]ll rules and regulations made under this article shall be uniform insofar as practicable." 10 U. S. C. § 836(b). This is little more than an impermissible repeal by implication.

See *Branch* v. *Smith*, 538 U. S. 254, 273 (2003) (plurality opinion) ("We have repeatedly stated . . . that absent a clearly expressed congressional intention, repeals by implication are not favored" (citations and internal quotation marks omitted)). Moreover, the Court's conclusion is flatly contrary to its duty not to set aside Hamdan's commission "without the *clear* conviction that [it is] in conflict with the . . . laws of Congress constitutionally enacted." *Quirin*, *supra*, at 25 (emphasis added).

Nothing in the text of Article 36(b) supports the Court's sweeping conclusion that it represents an unprecedented congressional effort to change the nature of military commissions from common-law war courts to tribunals that must presumptively function like courts-martial. And such an interpretation would be strange indeed. The vision of uniformity that motivated the adoption of the UCMJ, embodied specifically in Article 36(b), is nothing more than uniformity across the separate branches of the armed services. See Act of May 5, 1950, ch. 169, 64 Stat. 107 (preamble to the UCMJ explaining that the UCMJ is an Act "[t]o unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard"). There is no indication that the UCMJ was intended to require uniformity in procedure between courts-martial and military commissions, tribunals that the UCMJ itself recognizes are different. To the contrary, the UCMJ expressly recognizes that different tribunals will be constituted in different manners and employ different procedures. See 10 U. S. C. §866 (providing for three different types of courts-martial—general, special, and summary—constituted in different manners and employing different procedures). Thus, Article 36(b) is best understood as establishing that, so far as practicable, the rules and regulations governing tribunals convened by the Navy must be uniform with the rules and regulations governing tribunals convened by the Army. But, consistent with this Court's prior interpreta-

tions of Article 21 and over a century of historical practice, it cannot be understood to require the President to conform the procedures employed by military commissions to those employed by courts-martial.[17]

Even if Article 36(b) could be construed to require procedural uniformity among the various tribunals contemplated by the UCMJ, Hamdan would not be entitled to relief. Under the Court's reading, the President is entitled to prescribe different rules for military commissions than for courts-martial when he determines that it is not "practicable" to prescribe uniform rules. The Court does not resolve the level of deference such determinations would be owed, however, because, in its view, "[t]he President has not . . . [determined] that it is impracticable to apply the rules for courts-martial." *Ante*, at 623. This is simply not the case. On the same day that the President issued Military Commission Order No. 1, the Secretary of Defense explained that "the president decided to establish military commissions because he wanted the option of a process that is different from those processes which we already have, namely, the federal court system . . . and the military court system," Dept. of

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[17] It bears noting that while the Court does not hesitate to cite legislative history that supports its view of certain statutory provisions, see *ante*, at 579, 580–581, n. 10, it makes no citation of the legislative history pertaining to Article 36(b), which contradicts its interpretation of that provision. Indeed, if it were authoritative, the *only* legislative history relating to Article 36(b) would confirm the obvious—Article 36(b)'s uniformity requirement pertains to uniformity between the three branches of the Armed Forces, and no more. When that subsection was introduced as an amendment to Article 36, its author explained that it would leave the three branches "enough leeway to provide a different provision where it is absolutely necessary" because "there are some differences in the services." Hearings on H. R. 2498 before the Subcommittee No. 1 of the House Committee on Armed Services, 81st Cong., 1st Sess., 1015 (1949). A further statement explained that "there might be some slight differences that would pertain as to the Navy in contrast to the Army, but at least [Article 36(b)] is an expression of the congressional intent that we want it to be as uniform as possible." *Ibid.*

Defense News Briefing on Military Commissions (Mar. 21, 2002) (remarks of Donald Rumsfeld), available at http://www.dod.gov/transcripts/2002/t03212002_t0321sd.html (as visited June 26, 2006, and available in Clerk of Court's case file) (hereinafter News Briefing), and that "[t]he commissions are intended to be different . . . because the [P]resident recognized that there had to be differences to deal with the unusual situation we face and that a different approach was needed." *Ibid.* The President reached this conclusion because

> "we're in the middle of a war, and . . . had to design a procedure that would allow us to pursue justice for these individuals while at the same time prosecuting the war most effectively. And that means setting rules that would allow us to preserve our intelligence secrets, develop more information about terrorist activities that might be planned for the future so that we can take action to prevent terrorist attacks against the United States. . . . [T]here was a constant balancing of the requirements of our war policy and the importance of providing justice for the individuals . . . and *each* deviation from the standard kinds of rules that we have in our criminal courts was motivated by the desire to strike this balance between individual justice and the broader war policy." *Ibid.* (remarks of Douglas J. Feith, Under Secretary of Defense for Policy (emphasis added)).

The Court provides no explanation why the President's determination that employing court-martial procedures in the military commissions established pursuant to Military Commission Order No. 1 would hamper our war effort is in any way inadequate to satisfy its newly minted "practicability" requirement. On the contrary, this determination is precisely the kind for which the "Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial

intrusion or inquiry.'" *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S., at 111. And, in the context of the present conflict, it is exactly the kind of determination Congress countenanced when it authorized the President to use all necessary and appropriate force against our enemies. Accordingly, the President's determination is sufficient to satisfy any practicability requirement imposed by Article 36(b).

The Court further contends that Hamdan's commission is unlawful because it fails to provide him the right to be present at his trial, as recognized in 10 U. S. C. §839(c) (2000 ed., Supp. V). *Ante*, at 624. But §839(c) applies to courts-martial, not military commissions. It provides:

> "When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases in which a military judge has been detailed to the court, the military judge."

In context, "all other proceedings" plainly refers exclusively to "other proceedings" pertaining to a court-martial.[18] This is confirmed by the provision's subsequent reference to "members of the *court*" and to "cases in which a military judge has been detailed to the *court*." It is also confirmed by the other provisions of §839, which refer only to courts-martial. See §§839(a)(1)–(4) ("[A]ny time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the mili-

[18] In addition to being foreclosed by the text of the provision, the Court's suggestion that 10 U. S. C. §839(c) (2000 ed., Supp. V) applies to military commissions is untenable because it would require, in military commission proceedings, that the accused be present when the members of the commission voted on his guilt or innocence.

tary judge may . . . call the court into session without the presence of the members for the purpose of" hearing motions, issuing rulings, holding arraignments, receiving pleas, and performing various procedural functions). See also § 839(b) ("Proceedings under subsection (a) shall be conducted in the presence of the accused"). Section 839(c) simply does not address the procedural requirements of military commissions.

B

The Court contends that Hamdan's military commission is also unlawful because it violates Common Article 3 of the Geneva Conventions, see *ante,* at 629–635. Furthermore, Hamdan contends that his commission is unlawful because it violates various provisions of the Third Geneva Convention. These contentions are untenable.

1

As an initial matter, and as the Court of Appeals concluded, both of Hamdan's Geneva Convention claims are foreclosed by *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950). In that case the respondents claimed, *inter alia*, that their military commission lacked jurisdiction because it failed to provide them with certain procedural safeguards that they argued were required under the Geneva Conventions. *Id.*, at 789–790. While this Court rejected the underlying merits of the respondents' Geneva Convention claims, *id.*, at 790, it also held, in the alternative, that the respondents could "not assert . . . that anything in the Geneva Convention makes them immune from prosecution or punishment for war crimes," *id.*, at 789. The Court explained:

> "We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These

> prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention." *Id.*, at 789, n. 14.

This alternative holding is no less binding than if it were the exclusive basis for the Court's decision. See *Massachusetts* v. *United States*, 333 U. S. 611, 623 (1948). While the Court attempts to cast *Eisentrager*'s unqualified, alternative holding as footnote dictum, *ante*, at 627, it does not dispute the correctness of its conclusion, namely, that the provisions of the 1929 Geneva Convention were not judicially enforceable because that Convention contemplated that diplomatic measures by political and military authorities were the exclusive mechanisms for such enforcement. Nor does the Court suggest that the 1949 Geneva Conventions departed from this framework. See *ibid.* ("We may assume that 'the obvious scheme' of the 1949 Conventions is identical in all relevant respects to that of the 1929 Convention").

Instead, the Court concludes that petitioner may seek judicial enforcement of the provisions of the Geneva Conventions because "they are . . . part of the law of war. And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted." *Ante*, at 628 (citation omitted). But Article 21 authorizes the use of military commissions; it does not purport to render judicially enforceable aspects of the law of war that are not so enforceable of their own accord. See *Quirin*, 317 U. S., at 28 (by enacting Article 21, "Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war"). The Court cannot escape *Eisentrager*'s holding

merely by observing that Article 21 mentions the law of war; indeed, though *Eisentrager* did not specifically consider the Court's novel interpretation of Article 21, *Eisentrager* involved a challenge to the legality of a World War II military commission, which, like all such commissions, found its authorization in Article 15 of the Articles of War, the predecessor to Article 21 of the UCMJ. Thus, the Court's interpretation of Article 21 is foreclosed by *Eisentrager*.

In any event, the Court's argument is too clever by half. The judicial nonenforceability of the Geneva Conventions derives from the fact that those Conventions have exclusive enforcement mechanisms, see *Eisentrager*, *supra*, at 789, n. 14, and this, too, is part of the law of war. The Court's position thus rests on the assumption that Article 21's reference to the "laws of war" selectively incorporates only those aspects of the Geneva Conventions that the Court finds convenient, namely, the substantive requirements of Common Article 3, and not those aspects of the Conventions that the Court, for whatever reason, disfavors, namely, the Conventions' exclusive diplomatic enforcement scheme. The Court provides no account of why the *partial* incorporation of the Geneva Conventions should extend only so far—and no further—because none is available beyond its evident preference to adjudicate those matters that the law of war, through the Geneva Conventions, consigns exclusively to the political branches.

Even if the Court were correct that Article 21 of the UCMJ renders judicially enforceable aspects of the law of war that are not so enforceable by their own terms, Article 21 simply cannot be interpreted to render judicially enforceable the particular provision of the law of war at issue here, namely, Common Article 3 of the Geneva Conventions. As relevant, Article 21 provides that "[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to *offenders or offenses* that by statute *or by*

the law of war may be tried by military commissions." 10 U. S. C. §821 (emphasis added). Thus, to the extent Article 21 can be interpreted as authorizing judicial enforcement of aspects of the law of war that are not otherwise judicially enforceable, that authorization only extends to provisions of the law of war that relate to whether a particular "offender" or a particular "offense" is triable by military commission. Common Article 3 of the Geneva Conventions, the sole provision of the Geneva Conventions relevant to the Court's holding, relates to neither. Rather, it relates exclusively to the particulars of the tribunal itself, namely, whether it is "regularly constituted" and whether it "afford[s] all the judicial guarantees which are recognized as indispensable by civilized peoples." Third Geneva Convention, Art. 3, ¶1*(d)*, Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3320, T. I. A. S. No. 3364.

2

In addition to being foreclosed by *Eisentrager*, Hamdan's claim under Common Article 3 of the Geneva Conventions is meritless. Common Article 3 applies to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." 6 U. S. T., at 3318. "Pursuant to [his] authority as Commander in Chief and Chief Executive of the United States," the President has "accept[ed] the legal conclusion of the Department of Justice . . . that common Article 3 of Geneva does not apply to . . . al Qaeda . . . detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'" App. 35. Under this Court's precedents, "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 184–185 (1982); *United States* v. *Stuart*, 489 U. S. 353, 369 (1989). Our duty to defer to the

President's understanding of the provision at issue here is only heightened by the fact that he is acting pursuant to his constitutional authority as Commander in Chief and by the fact that the subject matter of Common Article 3 calls for a judgment about the nature and character of an armed conflict. See generally *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320 (1936).

The President's interpretation of Common Article 3 is reasonable and should be sustained. The conflict with al Qaeda is international in character in the sense that it is occurring in various nations around the globe. Thus, it is also "occurring in the territory of" more than "one of the High Contracting Parties." The Court does not dispute the President's judgments respecting the nature of our conflict with al Qaeda, nor does it suggest that the President's interpretation of Common Article 3 is implausible or foreclosed by the text of the treaty. Indeed, the Court concedes that Common Article 3 is principally concerned with "furnish[ing] minimal protection to rebels involved in . . . a civil war," *ante*, at 631, precisely the type of conflict the President's interpretation envisions to be subject to Common Article 3. Instead, the Court, without acknowledging its duty to defer to the President, adopts its own, admittedly plausible, reading of Common Article 3. But where, as here, an ambiguous treaty provision ("not of an international character") is susceptible of two plausible, and reasonable, interpretations, our precedents require us to defer to the Executive's interpretation.

3

But even if Common Article 3 were judicially enforceable and applicable to the present conflict, petitioner would not be entitled to relief. As an initial matter, any claim petitioner has under Common Article 3 is not ripe. The only relevant "acts" that "are and shall remain prohibited" under Common Article 3 are "the *passing of sentences* and the *carrying out of executions* without previous judgment pro-

nounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Art. 3, ¶ 1*(d)*, 6 U. S. T., at 3318, 3320 (emphasis added). As its terms make clear, Common Article 3 is only violated, as relevant here, by the act of "passing of sentenc[e]," and thus Hamdan will only have a claim *if* his military commission convicts him and imposes a sentence. Accordingly, as Hamdan's claim is "contingent [upon] future events that may not occur as anticipated, or indeed may not occur at all," it is not ripe for adjudication. *Texas* v. *United States*, 523 U. S. 296, 300 (1998) (internal quotation marks omitted).[19] Indeed, even if we assume he will be convicted and sentenced, whether his trial will be conducted in a manner so as to deprive him of "the judicial guarantees which are recognized as indispensable by civilized peoples" is entirely speculative. And premature adjudication of Hamdan's claim is especially inappropriate here because "reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines* v. *Byrd*, 521 U. S. 811, 819–820 (1997).

In any event, Hamdan's military commission complies with the requirements of Common Article 3. It is plainly "regularly constituted" because such commissions have been employed throughout our history to try unlawful combatants for crimes against the law of war. This Court has recounted that history as follows:

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[19] The Court does not dispute the conclusion that Common Article 3 cannot be violated unless and until Hamdan is convicted and sentenced. Instead, it contends that "the Geneva Conventions d[o] not direct an accused to wait until sentence is imposed to challenge the legality of the tribunal that is to try him." *Ante*, at 626, n. 55. But the Geneva Conventions do not direct defendants to enforce their rights through litigation, but through the Conventions' exclusive diplomatic enforcement provisions. Moreover, neither the Court's observation respecting the Geneva Conventions nor its reference to the equitable doctrine of abstention bears on the *constitutional* prohibition on adjudicating unripe claims.

> "'By a practice dating from 1847 and renewed and firmly established during the Civil War, military commissions have become adopted as authorized tribunals in this country in time of war. . . . Their competency has been recognized not only in acts of Congress, but in executive proclamations, in rulings of the courts, and in the opinions of the Attorneys General.'" *Madsen*, 343 U. S., at 346, n. 8.

Hamdan's commission has been constituted in accordance with these historical precedents. As I have previously explained, the procedures to be employed by that commission, and the Executive's authority to alter those procedures, are consistent with the practice of previous American military commissions. See *supra*, at 706–712, and n. 15.

The Court concludes Hamdan's commission fails to satisfy the requirements of Common Article 3 not because it differs from the practice of previous military commissions but because it "deviate[s] from [the procedures] governing courts-martial." *Ante*, at 634. But there is neither a statutory nor historical requirement that military commissions conform to the structure and practice of courts-martial. A military commission is a different tribunal, serving a different function, and thus operates pursuant to different procedures. The 150-year pedigree of the military commission is itself sufficient to establish that such tribunals are "regularly constituted court[s]." Art. 3, ¶ 1*(d)*, 6 U. S. T., at 3320.

Similarly, the procedures to be employed by Hamdan's commission afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." Neither the Court nor petitioner disputes the Government's description of those procedures.

> "Petitioner is entitled to appointed military legal counsel, 32 C.F.R. 9.4(c)(2), and may retain a civilian attorney (which he has done), 32 C.F.R. 9.4(c)(2)(iii)(B). Petitioner is entitled to the presumption of innocence, 32

> C.F.R. 9.5(b), proof beyond a reasonable doubt, 32 C.F.R. 9.5(c), and the right to remain silent, 32 C.F.R. 9.5(f). He may confront witnesses against him, 32 C.F.R. 9.5(i), and may subpoena his own witnesses, if reasonably available, 32 C.F.R. 9.5(h). Petitioner may personally be present at every stage of the trial unless he engages in disruptive conduct or the prosecution introduces classified or otherwise protected information for which no adequate substitute is available and whose admission will not deprive him of a full and fair trial, 32 C.F.R. 9.5(k); Military Commission Order No. 1 (Dep't of Defense Aug. 31, 2005) § 6(B)(3) and (D)(5)(b). If petitioner is found guilty, the judgment will be reviewed by a review panel, the Secretary of Defense, and the President, if he does not designate the Secretary as the final decisionmaker. 32 C.F.R. 9.6(h). The final judgment is subject to review in the Court of Appeals for the District of Columbia Circuit and ultimately in this Court. See DTA § 1005(e)(3), 119 Stat. 2743; 28 U. S. C. 1254(1)." Brief for Respondents 4.

Notwithstanding these provisions, which in my judgment easily satisfy the nebulous standards of Common Article 3,[20] the plurality concludes that Hamdan's commission is unlawful because of the possibility that Hamdan will be barred from proceedings and denied access to evidence that may be used to convict him. *Ante*, at 633–635. But, under the commissions' rules, the Government may not impose such bar or denial on Hamdan if it would render his trial unfair,

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[20] Notably, a prosecutor before the *Quirin* military commission has described these procedures as "a substantial improvement over those in effect during World War II," further observing that "[t]hey go a long way toward assuring that the trials will be full and fair." National Institute of Military Justice, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, p. x (2002) (foreword by Lloyd N. Cutler).

a question that is clearly within the scope of the appellate review contemplated by regulation and statute.

Moreover, while the Executive is surely not required to offer a particularized defense of these procedures prior to their application, the procedures themselves make clear that Hamdan would only be excluded (other than for disruption) if it were necessary to protect classified (or classifiable) intelligence, Dept. of Defense, Military Commission Order No. 1, § 6(B)(3) (Aug. 31, 2005), including the sources and methods for gathering such intelligence. The Government has explained that "we want to make sure that these proceedings, which are going on in the middle of the war, do not interfere with our war effort and . . . because of the way we would be able to handle interrogations and intelligence information, may actually assist us in promoting our war aims." News Briefing (remarks of Douglas J. Feith, Under Secretary of Defense for Policy). And this Court has concluded, in the very context of a threat to reveal our Nation's intelligence gathering sources and methods, that "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation," *Haig*, 453 U. S., at 307 (quoting *Aptheker* v. *Secretary of State*, 378 U. S. 500, 509 (1964)), and that "[m]easures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests," *Haig*, *supra*, at 307. See also *Snepp* v. *United States*, 444 U. S. 507, 509, n. 3 (1980) *(per curiam)* ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service"); *Curtiss-Wright*, 299 U. S., at 320. This interest is surely compelling here. According to the Government, "[b]ecause al Qaeda operates as a clandestine force relying on sleeper agents to mount surprise attacks, one of the most critical fronts in the current war involves gathering intelligence about future terrorist attacks and how the terrorist network

operates—identifying where its operatives are, how it plans attacks, who directs operations, and how they communicate." Brief for United States in No. 03–4792, *United States* v. *Moussaoui* (CA4), p. 9. We should not rule out the possibility that this compelling interest can be protected, while at the same time affording Hamdan (and others like him) a fair trial.

In these circumstances, "civilized peoples" would take into account the context of military commission trials against unlawful combatants in the war on terrorism, including the need to keep certain information secret in the interest of preventing future attacks on our Nation and its foreign installations so long as it did not deprive the accused of a fair trial. Accordingly, the President's understanding of the requirements of Common Article 3 is entitled to "great weight." See *supra*, at 718.

4

In addition to Common Article 3, which applies to conflicts "not of an international character," Hamdan also claims that he is entitled to the protections of the Third Geneva Convention, which applies to conflicts between two or more High Contracting Parties. There is no merit to Hamdan's claim.

Article 2 of the Convention provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." 6 U. S. T., at 3318. "Pursuant to [his] authority as Commander in Chief and Chief Executive of the United States," the President has determined that the Convention is inapplicable here, explaining that "none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party." App. 35. The President's findings about the nature of the present conflict with respect to members of al Qaeda operating in Afghanistan represents a core

exercise of his Commander in Chief authority that this Court is bound to respect. See *Prize Cases*, 2 Black, at 670.

* * *

For these reasons, I would affirm the judgment of the Court of Appeals.

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join in Parts I–III, dissenting.

For the reasons set out in JUSTICE SCALIA's dissent, which I join, I would hold that we lack jurisdiction. On the merits, I join JUSTICE THOMAS' dissent with the exception of Parts I, II–C–1, and III–B–2, which concern matters that I find unnecessary to reach. I add the following comments to provide a further explanation of my reasons for disagreeing with the holding of the Court.

I

The holding of the Court, as I understand it, rests on the following reasoning. A military commission is lawful only if it is authorized by 10 U. S. C. § 821; this provision permits the use of a commission to try "offenders or offenses" that "by statute or by the law of war may be tried by" such a commission; because no statute provides that an offender such as petitioner or an offense such as the one with which he is charged may be tried by a military commission, he may be tried by military commission only if the trial is authorized by "the law of war"; the Geneva Conventions are part of the law of war; and Common Article 3 of the Conventions prohibits petitioner's trial because the commission before which he would be tried is not "a regularly constituted court," Third Geneva Convention, Art. 3, ¶ 1*(d)*, Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3320, T. I. A. S. No. 3364. I disagree with this holding because petitioner's commission is "a regularly constituted court."

Common Article 3 provides as follows:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
> "(1) . . . [T]he following acts are and shall remain prohibited . . . :
> . . . . .
> "*(d)* [T]he passing of sentences and the carrying out of executions without previous judgment pronounced by *a regularly constituted court* affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.*, at 3318–3320 (emphasis added).

Common Article 3 thus imposes three requirements. Sentences may be imposed only by (1) a "court" (2) that is "regularly constituted" and (3) that affords "all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.*, at 3320.

I see no need here to comment extensively on the meaning of the first and third requirements. The first requirement is largely self-explanatory, and, with respect to the third, I note only that on its face it imposes a uniform international standard that does not vary from signatory to signatory.

The second element ("regularly constituted") is the one on which the Court relies, and I interpret this element to require that the court be appointed or established in accordance with the appointing country's domestic law. I agree with the Court, see *ante*, at 632, n. 64, that, as used in Common Article 3, the term "regularly" is synonymous with "properly." The term "constitute" means "appoint," "set up," or "establish," Webster's Third New International Dictionary 486 (1961), and therefore "regularly constituted" means properly appointed, set up, or established. Our cases repeatedly use the phrases "regularly constituted" and "properly constituted" in this sense. See, *e. g.*, *Hamdi* v.

Rumsfeld, 542 U. S. 507, 538 (2004) (plurality opinion of O'Connor, J.); *Nguyen* v. *United States*, 539 U. S. 69, 83 (2003); *Ryder* v. *United States*, 515 U. S. 177, 187 (1995); *Williams* v. *Bruffy*, 96 U. S. 176, 185 (1878).

In order to determine whether a court has been properly appointed, set up, or established, it is necessary to refer to a body of law that governs such matters. I interpret Common Article 3 as looking to the domestic law of the appointing country because I am not aware of any international law standard regarding the way in which such a court must be appointed, set up, or established, and because different countries with different government structures handle this matter differently. Accordingly, "a regularly constituted court" is a court that has been appointed, set up, or established in accordance with the domestic law of the appointing country.

II

In contrast to this interpretation, the opinions supporting the judgment today hold that the military commission before which petitioner would be tried is not "a regularly constituted court" (1) because "no evident practical need explains" why its "structure and composition . . . deviate from conventional court-martial standards," *ante*, at 647 (KENNEDY, J., concurring in part); see also *ante*, at 632–633 (opinion of the Court); and (2) because, contrary to 10 U. S. C. § 836(b), the procedures specified for use in the proceeding before the military commission impermissibly differ from those provided under the Uniform Code of Military Justice (UCMJ) for use by courts-martial, *ante*, at 615–625 (opinion of the Court); *ante*, at 651–653 (KENNEDY, J., concurring in part). I do not believe that either of these grounds is sound.

A

I see no basis for the Court's holding that a military commission cannot be regarded as "a regularly constituted court" unless it is similar in structure and composition to a

regular military court or unless there is an "evident practical need" for the divergence. There is no reason why a court that differs in structure or composition from an ordinary military court must be viewed as having been improperly constituted. Tribunals that vary significantly in structure, composition, and procedures may all be "regularly" or "properly" constituted. Consider, for example, a municipal court, a state trial court of general jurisdiction, an Article I federal trial court, a federal district court, and an international court, such as the International Criminal Tribunal for the former Yugoslavia. Although these courts are "differently constituted" and differ substantially in many other respects, they are all "regularly constituted."

If Common Article 3 had been meant to require trial before a country's military courts or courts that are similar in structure and composition, the drafters almost certainly would have used language that expresses that thought more directly. Other provisions of the Convention Relative to the Treatment of Prisoners of War refer expressly to the ordinary military courts and expressly prescribe the "uniformity principle" that JUSTICE KENNEDY sees in Common Article 3, see *ante*, at 643–644. Article 84 provides that "[a] prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war." 6 U. S. T., at 3382. Article 87 states that "[p]risoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts." *Id.*, at 3384. Similarly, Article 66 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War—a provision to which the Court looks for guidance in interpreting Common Article 3, see *ante*, at 632—expressly provides that ci-

vilians charged with committing crimes in occupied territory may be handed over by the occupying power "to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country." 6 U. S. T. 3516, 3558–3560, T. I. A. S. No. 3365. If Common Article 3 had been meant to incorporate a "uniformity principle," it presumably would have used language like that employed in the provisions noted above. For these reasons, I cannot agree with the Court's conclusion that the military commission at issue here is not a "regularly constituted court" because its structure and composition differ from those of a court-martial.

Contrary to the suggestion of the Court, see *ante*, at 632, the commentary on Article 66 of the Fourth Geneva Convention does not undermine this conclusion. As noted, Article 66 permits an occupying power to try civilians in its "properly constituted, non-political military courts," 6 U. S. T., at 3558. The commentary on this provision states:

> "The courts are to be 'regularly constituted.' This wording definitely excludes all special tribunals. It is the ordinary military courts of the Occupying Power which will be competent." 4 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 340 (J. Pictet gen. ed. 1958) (hereinafter GCIV Commentary).

The Court states that this commentary "defines '"regularly constituted"' tribunals to include 'ordinary military courts' and 'definitely exclud[e] all special tribunals.'" *Ante*, at 632 (alteration in original). This much is clear from the commentary itself. Yet the mere statement that a military court *is* a regularly constituted tribunal is of no help in addressing petitioner's claim that his commission *is not* such a tribunal. As for the commentary's mention of "special tribunals," it is doubtful whether we should take this gloss on Article 66—which prohibits an *occupying power* from trying *civilians* in courts set up specially for that purpose—to tell

us much about the very different context addressed by Common Article 3.

But even if Common Article 3 recognizes this prohibition on "special tribunals," that prohibition does not cover petitioner's tribunal. If "special" means anything in contradistinction to "regular," it would be in the sense of "special" as "relating to a single thing," and "regular" as "uniform in course, practice, or occurrence." Webster's Third New International Dictionary 2186, 1913. Insofar as respondents propose to conduct the tribunals according to the procedures of Military Commission Order No. 1 and orders promulgated thereunder—and nobody has suggested respondents intend otherwise—then it seems that petitioner's tribunal, like the hundreds of others respondents propose to conduct, is very much regular and not at all special.

B

I also disagree with the Court's conclusion that petitioner's military commission is "illegal," *ante*, at 625, because its procedures allegedly do not comply with 10 U. S. C. § 836. Even if § 836(b), unlike Common Article 3, does impose at least a limited uniformity requirement amongst the tribunals contemplated by the UCMJ, but see *ante*, at 711–712 (THOMAS, J., dissenting), and even if it is assumed for the sake of argument that some of the procedures specified in Military Commission Order No. 1 impermissibly deviate from court-martial procedures, it does not follow that the military commissions created by that order are not "regularly constituted" or that trying petitioner before such a commission would be inconsistent with the law of war. If Congress enacted a statute requiring the federal district courts to follow a procedure that is unconstitutional, the statute would be invalid, but the district courts would not. Likewise, if some of the procedures that may be used in military commission proceedings are improper, the appropriate remedy is to proscribe the use of those particular procedures, not to out-

law the commissions. I see no justification for striking down the entire commission structure simply because it is possible that petitioner's trial might involve the use of some procedure that is improper.

III

Returning to the three elements of Common Article 3—(1) a court, (2) that is appointed, set up, and established in compliance with domestic law, and (3) that respects universally recognized fundamental rights—I conclude that all of these elements are satisfied in this case.

A

First, the commissions qualify as courts.

Second, the commissions were appointed, set up, and established pursuant to an order of the President, just like the commission in *Ex parte Quirin*, 317 U. S. 1 (1942), and the Court acknowledges that *Quirin* recognized that the statutory predecessor of 10 U. S. C. § 821 "preserved" the President's power "to convene military commissions," *ante*, at 593. Although JUSTICE KENNEDY concludes that "an acceptable degree of independence from the Executive is necessary to render a commission 'regularly constituted' by the standards of our Nation's system of justice," *ante*, at 645, he offers no support for this proposition (which in any event seems to be more about fairness or integrity than regularity). The commission in *Quirin* was certainly no more independent from the Executive than the commissions at issue here, and 10 U. S. C. §§ 821 and 836 do not speak to this issue.[1]

Finally, the commission procedures, taken as a whole, and including the availability of review by a United States Court of Appeals and by this Court, do not provide a basis for

[1] Section 821 looks to the "law of war," not separation-of-powers issues. And § 836, as JUSTICE KENNEDY notes, concerns procedures, not structure, see *ante*, at 645.

deeming the commissions to be illegitimate. The Court questions the following two procedural rules: the rule allowing the Secretary of Defense to change the governing rules "'from time to time'" (which does not rule out midtrial changes), see *ante*, at 633, n. 65 (opinion of the Court); *ante*, at 645 (KENNEDY, J., concurring in part), and the rule that permits the admission of any evidence that would have "'probative value to a reasonable person'" (which departs from our legal system's usual rules of evidence), see *ante*, at 614–615, 623 (opinion of the Court); *ante*, at 651–653 (KENNEDY, J., concurring in part).[2] Neither of these two rules undermines the legitimacy of the commissions.

Surely the entire commission structure cannot be stricken merely because it is possible that the governing rules might be changed during the course of one or more proceedings. *If* a change is made and applied during the course of an ongoing proceeding and *if* the accused is found guilty, the validity of that procedure can be considered in the review proceeding for that case. After all, not every midtrial change will be prejudicial. A midtrial change might amend the governing rules in a way that is inconsequential or actually favorable to the accused.

As for the standard for the admission of evidence at commission proceedings, the Court does not suggest that this rule violates the international standard incorporated into Common Article 3 ("the judicial guarantees which are recognized as indispensable by civilized peoples," 6 U. S. T., at 3320). Rules of evidence differ from country to country, and much of the world does not follow aspects of our evidence

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[2] The plurality, but not JUSTICE KENNEDY, suggests that the commission rules are improper insofar as they allow a defendant to be denied access to evidence under some circumstances. See *ante*, at 633–635. But here, too, if this procedure is used in a particular case and the accused is convicted, the validity of this procedure can be challenged in the review proceeding in that case. In that context, both the asserted need for the procedure and its impact on the accused can be analyzed in concrete terms.

rules, such as the general prohibition against the admission of hearsay. See, *e. g.*, Blumenthal, Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective, 13 Pace Int'l L. Rev. 93, 96–101 (2001). If a particular accused claims to have been unfairly prejudiced by the admission of particular evidence, that claim can be reviewed in the review proceeding for that case. It makes no sense to strike down the entire commission structure based on speculation that some evidence might be improperly admitted in some future case.

In sum, I believe that Common Article 3 is satisfied here because the military commissions (1) qualify as courts, (2) that were appointed and established in accordance with domestic law, and (3) any procedural improprieties that might occur in particular cases can be reviewed in those cases.

B

The commentary on Common Article 3 supports this interpretation. The commentary on Common Article 3, ¶ 1*(d)*, in its entirety states:

> "[A]lthough [sentences and executions without a proper trial] were common practice until quite recently, they are nevertheless shocking to the civilized mind. . . . Sentences and executions without previous trial are too open to error. 'Summary justice' may be effective on account of the fear it arouses . . . , but it adds too many further innocent victims to all the other innocent victims of the conflict. All civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors. The Convention has rightly proclaimed that it is essential to do this even in time of war. *We must be very clear about one point: it is only 'summary' justice which it is intended to prohibit.* No sort of immunity is given to anyone under this provision. There is nothing in it to prevent

> a person presumed to be guilty from being arrested and so placed in a position where he can do no further harm; and it leaves intact the right of the State to prosecute, sentence and punish according to the law." GCIV Commentary 39 (emphasis added).

It seems clear that the commissions at issue here meet this standard. Whatever else may be said about the system that was created by Military Commission Order No. 1 and augmented by the Detainee Treatment Act, § 1005(e)(1), 119 Stat. 2742, this system—which features formal trial procedures, multiple levels of administrative review, and the opportunity for review by a United States Court of Appeals and by this Court—does not dispense "summary justice."

* * *

For these reasons, I respectfully dissent.

Syllabus

CLARK *v.* ARIZONA

CERTIORARI TO THE COURT OF APPEALS OF ARIZONA

No. 05–5966. Argued April 19, 2006—Decided June 29, 2006

Petitioner Clark was charged with first-degree murder under an Arizona statute prohibiting "[i]nten[tionally] or knowing[ly]" killing a police officer in the line of duty. At his bench trial, Clark did not contest that he shot the officer or that the officer died, but relied on his own undisputed paranoid schizophrenia at the time of the incident to deny that he had the specific intent to shoot an officer or knowledge that he was doing so. Accordingly, the prosecutor offered circumstantial evidence that Clark knew the victim was a police officer and testimony indicating that Clark had previously stated he wanted to shoot police and had lured the victim to the scene to kill him. In presenting the defense case, Clark claimed mental illness, which he sought to introduce for two purposes. First, he raised the affirmative defense of insanity, putting the burden on himself to prove by clear and convincing evidence that, in the words of another state statute, "at the time of the [crime, he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong." Second, he aimed to rebut the prosecution's evidence of the requisite *mens rea*, that he had acted intentionally or knowingly to kill an officer.

Ruling that Clark could not rely on evidence bearing on insanity to dispute the *mens rea*, the trial court cited the Arizona Supreme Court's decision in *State* v. *Mott*, 187 Ariz. 536, 931 P. 2d 1046, which refused to allow psychiatric testimony to negate specific intent and held that Arizona does not allow evidence of a mental disorder short of insanity to negate the *mens rea* element of a crime. As to his insanity, then, Clark presented lay testimony describing his increasingly bizarre behavior over the year before the shooting. Other lay and expert testimony indicated, among other things, that Clark thought that "aliens" (some impersonating government agents) were trying to kill him and that bullets were the only way to stop them. A psychiatrist testified that Clark was suffering from paranoid schizophrenia with delusions about "aliens" when he killed the officer, and concluded that Clark was incapable of luring the officer or understanding right from wrong and was thus insane at the time of the killing. In rebuttal, the State's psychiatrist gave his opinion that Clark's paranoid schizophrenia did not keep him from appreciating the wrongfulness of his conduct before and after the shooting. The judge then issued a first-degree murder verdict, finding

that in light of the facts of the crime, the expert evaluations, Clark's actions and behavior both before and after the shooting, and the observations of those who knew him, Clark had not established that his schizophrenia distorted his perception of reality so severely that he did not know his actions were wrong.

Clark moved to vacate the judgment and life sentence, arguing, among other things, that Arizona's insanity test and its *Mott* rule each violate due process. He claimed that the Arizona Legislature had impermissibly narrowed its insanity standard in 1993 when it eliminated the first of the two parts of the traditional *M'Naghten* insanity test. The trial court denied the motion. Affirming, the Arizona Court of Appeals held, among other things, that the State's insanity scheme was consistent with due process. The court read *Mott* as barring the trial court's consideration of evidence of Clark's mental illness and capacity directly on the element of *mens rea*.

Held:

1. Due process does not prohibit Arizona's use of an insanity test stated solely in terms of the capacity to tell whether an act charged as a crime was right or wrong. Pp. 747–756.

(a) The first part of the landmark English rule in *M'Naghten's Case* asks about cognitive capacity: whether a mental defect leaves a defendant unable to understand what he was doing. The second part presents an ostensibly alternative basis for recognizing a defense of insanity understood as a lack of moral capacity: whether a mental disease or defect leaves a defendant unable to understand that his action was wrong. Although the Arizona Legislature at first adopted the full *M'Naghten* statement, it later dropped the cognitive incapacity part. Under current Arizona law, a defendant will not be adjudged insane unless he demonstrates that at the time of the crime, he was afflicted with a mental disease or defect of such severity that he did not know the criminal act was wrong. Pp. 747–748.

(b) Clark insists that the side-by-side *M'Naghten* test represents the minimum that a government must provide, and he argues that eliminating the first part "'offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" *Patterson* v. *New York*, 432 U. S. 197, 202. The claim entails no light burden, and Clark does not carry it. History shows no deference to *M'Naghten* that could elevate its formula to the level of fundamental principle, so as to limit the traditional recognition of a State's capacity to define crimes and defenses. See, *e. g.*, *Patterson*, *supra*, at 210. Even a cursory examination of the traditional Anglo-American approaches to insanity reveals significant differences among them, with

four traditional strains variously combined to yield a diversity of American standards. Although 17 States and the Federal Government have adopted recognizable versions of the *M'Naghten* test with both its components, other States have adopted a variety of standards based on all or part of one or more of four variants. The alternatives are multiplied further by variations in the prescribed insanity verdict. This varied background makes clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice. Pp. 748–753.

(c) Nor does Arizona's abbreviation of the *M'Naghten* statement raise a proper claim that some constitutional minimum has been shortchanged. Although Arizona's former statement of the full *M'Naghten* rule was constitutionally adequate, the abbreviated rule is no less so, for cognitive incapacity is relevant under that statement, just as it was under the more extended formulation, and evidence going to cognitive incapacity has the same significance under the short form as it had under the long. Though Clark is correct that applying the moral incapacity test (telling right from wrong) does not necessarily require evaluation of a defendant's cognitive capacity to appreciate the nature and quality of the acts charged against him, his argument fails to recognize that cognitive incapacity is itself enough to demonstrate moral incapacity, so that evidence bearing on whether the defendant knew the nature and quality of his actions is both relevant and admissible. In practical terms, if a defendant did not know what he was doing when he acted, he could not have known that he was performing the wrongful act charged as a crime. The Arizona appeals court acknowledged as much in this case. Clark adopted this very analysis in the trial court, which apparently agreed when it admitted his cognitive incapacity evidence for consideration under the State's moral incapacity formulation. Clark can point to no evidence bearing on insanity that was excluded. Pp. 753–756.

2. The Arizona Supreme Court's *Mott* rule does not violate due process. Pp. 756–779.

(a) *Mott* held that testimony of a professional psychologist or psychiatrist about a defendant's mental incapacity owing to mental disease or defect was admissible, and could be considered, only for its bearing on an insanity defense, but could not be considered on the element of *mens rea*. Of the three categories of evidence that potentially bear on *mens rea*—(1) everyday "observation evidence" either by lay or expert witnesses of what Clark did or said, which may support the professional diagnoses of disease and in any event is the kind of evidence that can be relevant to show what was on Clark's mind when he fired his gun;

(2) "mental-disease evidence," typically from professional psychologists or psychiatrists based on factual reports, professional observations, and tests about Clark's mental disease, with features described by the witness; and (3) "capacity evidence," typically by the same experts, about Clark's capacity for cognition and moral judgment (and ultimately also his capacity to form *mens rea*)—*Mott* imposed no restriction on considering evidence of the first sort, but applies to the latter two. Although the trial court seems to have applied the *Mott* restriction to all three categories of evidence Clark offered for the purpose of showing what he called his inability to form the required *mens rea*, his objection to *Mott*'s application does not turn on the distinction between lay and expert witnesses or the kinds of testimony they were competent to present. Rather, the issue here is Clark's claim that the *Mott* rule violates due process. Pp. 756–765.

(b) Clark's *Mott* challenge turns on the application of the presumption of innocence in criminal cases, the presumption of sanity, and the principle that a criminal defendant is entitled to present relevant and favorable evidence on an element of the offense charged against him. Pp. 765–771.

(i) The presumption of innocence is that a defendant is innocent unless and until the government proves beyond a reasonable doubt each element of the offense charged, including the mental element or *mens rea*. The modern tendency is to describe the *mens rea* required to prove particular offenses in specific terms, as shown in the Arizona statute requiring the State to prove that in acting to kill the victim, Clark intended to kill a law enforcement officer on duty or knew that the victim was such an officer on duty. As applied to *mens rea* (and every other element), the force of the presumption of innocence is measured by the force of the showing needed to overcome it, which is proof beyond a reasonable doubt that a defendant's state of mind was in fact what the charge states. See *In re Winship*, 397 U. S. 358, 361–363. P. 766.

(ii) The presumption of sanity dispenses with a requirement that the government include as an element of every criminal charge an allegation that the defendant had the capacity to form the *mens rea* necessary for conviction and criminal responsibility. Unlike the presumption of innocence, the presumption of sanity's force varies across the many state and federal jurisdictions, and prior law has recognized considerable leeway on the part of the legislative branch in defining the presumption's strength through the kind of evidence and degree of persuasiveness necessary to overcome it, see *Fisher* v. *United States*, 328 U. S. 463, 466–476. There are two points where the sanity or capacity presumption may be placed in issue. First, a State may allow a defendant to introduce (and a factfinder to consider) evidence of mental disease or

incapacity for the bearing it can have on the government's burden to show *mens rea*. Second, the sanity presumption's force may be tested in the consideration of an insanity defense raised by a defendant. Insanity rules like *M'Naghten* and the variants noted above are attempts to define or indicate the kinds of mental differences that overcome the presumption of sanity or capacity and therefore excuse a defendant from customary criminal responsibility, see, *e. g.*, *Jones* v. *United States*, 463 U. S. 354, 373, n. 4, even if the prosecution has otherwise overcome the presumption of innocence by convincing the factfinder of all the elements charged beyond a reasonable doubt. The burden a defendant raising the insanity issue must carry defines the strength of the sanity presumption. A State may, for example, place the burden of persuasion on a defendant to prove insanity as the applicable law defines it, whether by a preponderance of the evidence or to some more convincing degree. See, *e. g.*, *Leland* v. *Oregon*, 343 U. S. 790, 798. Pp. 766–769.

(iii) A defendant has a due process right to present evidence favorable to himself on an element that must be proven to convict him. Evidence tending to show that a defendant suffers from mental disease and lacks capacity to form *mens rea* is relevant to rebut evidence that he did in fact form the required *mens rea* at the time in question. Thus, Clark claims a right to require the factfinder in this case to consider testimony about his mental illness and his incapacity directly, when weighing the persuasiveness of other evidence tending to show *mens rea*, which the prosecution has the burden to prove. However, the right to introduce relevant evidence can be curtailed if there is a good reason for doing so. For example, trial judges may "exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes* v. *South Carolina*, 547 U. S. 319, 326. And if evidence may be kept out entirely, its consideration may be subject to limitation, which Arizona claims the power to impose here. Under state law, mental-disease and capacity evidence may be considered only for its bearing on the insanity defense, and it will avail a defendant only if it is persuasive enough to satisfy the defendant's burden as defined by the terms of that defense. Such evidence is thus being channeled or restricted to one issue; it is not being excluded entirely, and the question is whether reasons for requiring it to be channeled and restricted satisfy due process's fundamental fairness standard. Pp. 769–771.

(c) The reasons supporting the Arizona rule satisfy due process. Pp. 771–778.

(i) The first such reason is Arizona's authority to define its presumption of sanity (or capacity or responsibility) by choosing an insanity definition and placing the burden of persuasion on criminal defendants

claiming incapacity as an excuse. Consistent with due process, a State can require defendants to bear that burden, see *Leland*, *supra*, at 797–799, and Clark does not object to Arizona's decision to require persuasion to a clear and convincing degree before the presumption of sanity and normal responsibility is overcome. If a State is to have this authority in practice as well as in theory, it must be able to deny a defendant the opportunity to displace the sanity presumption more easily when addressing a different issue during the criminal trial. Yet just such an opportunity would be available if expert testimony of mental disease and incapacity could be considered for whatever a factfinder might think it was worth on the *mens rea* issue. The sanity presumption would then be only as strong as the evidence a factfinder would accept as enough to raise a reasonable doubt about *mens rea;* once reasonable doubt was found, acquittal would be required, and the standards established for the insanity defense would go by the boards. What counts for due process is simply that a State wishing to avoid a second avenue for exploring capacity, less stringent for a defendant, has a good reason for confining the consideration of mental-disease and incapacity evidence to the insanity defense. Pp. 771–773.

(ii) Arizona's rule also serves to avoid confusion and misunderstanding on the part of jurors. The controversial character of some categories of mental disease, the potential of mental-disease evidence to mislead, and the danger of according greater certainty to capacity evidence than experts claim for it give rise to risks that may reasonably be hedged by channeling the consideration of such evidence to the insanity issue on which, in States like Arizona, a defendant has the burden of persuasion. First, the diagnosis may mask vigorous debate within the psychiatric profession about the very contours of the mental disease itself. See, *e. g.*, *Jones*, *supra*, at 364–365, n. 13. Though mental-disease evidence is certainly not condemned wholesale, the consequence of this professional ferment is a general caution in treating psychological classifications as predicates for excusing otherwise criminal conduct. Next, there is the potential of mental-disease evidence to mislead jurors (when they are the factfinders) through the power of this kind of evidence to suggest that a defendant suffering from a recognized mental disease lacks cognitive, moral, volitional, or other capacity, when that may not be a sound conclusion at all. Even when a category of mental disease is broadly accepted and the assignment of a defendant's behavior to that category is uncontroversial, the classification may suggest something very significant about a defendant's capacity, when in fact the classification tells little or nothing about the defendant's ability to form *mens rea* or to exercise the cognitive, moral, or volitional capacities that define legal sanity. The limits of the utility of a professional disease

Syllabus

diagnosis are evident in the dispute between the two testifying experts in this case; they agree that Clark was schizophrenic, but they reach opposite conclusions on whether his mental disease left him bereft of cognitive or moral capacity. Finally, there are particular risks inherent in the opinions of the experts who supplement the mental-disease classifications with opinions on incapacity: on whether the mental disease rendered a particular defendant incapable of the cognition necessary for moral judgment or *mens rea* or otherwise incapable of understanding the wrongfulness of the conduct charged. Unlike observational evidence bearing on *mens rea*, capacity evidence consists of judgment, and judgment is fraught with multiple perils. Although such capacity judgments may be given in the utmost good faith, their potentially tenuous character is indicated by the candor of the defense expert in this very case. He testified that Clark lacked the capacity to appreciate the circumstances realistically and to understand the wrongfulness of what he was doing, but he admitted that no one knew exactly what was on Clark's mind at the time of the shooting. Even when an expert is confident that his understanding of the mind is reliable, judgment addressing the basic categories of capacity requires a leap from the concepts of psychology, which are devised for thinking about treatment, to the concepts of legal sanity, which are devised for thinking about criminal responsibility. Pp. 773–778.

(d) For these reasons, there is also no cause to claim that channeling evidence on mental disease and capacity offends any "'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" *Patterson*, 432 U. S., at 202. P. 779.

Affirmed.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined, and in which BREYER, J., joined except as to Parts III–B and III–C and the ultimate disposition. BREYER, J., filed an opinion concurring in part and dissenting in part, *post*, p. 779. KENNEDY, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 781.

David Goldberg, by appointment of the Court, 547 U. S. 1017, argued the cause and filed briefs for petitioner.

Randall M. Howe argued the cause for respondent. With him on the brief were *Terry Goddard*, Attorney General of Arizona, *Mary O'Grady*, Solicitor General, and *Michael O'Toole*, Assistant Attorney General.

Solicitor General Clement argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Assistant Attorney General Fisher, Deputy Solicitor General Dreeben, Matthew D. Roberts,* and *Kirby A. Heller.**

JUSTICE SOUTER delivered the opinion of the Court.

The case presents two questions: whether due process prohibits Arizona's use of an insanity test stated solely in terms of the capacity to tell whether an act charged as a crime was right or wrong; and whether Arizona violates due process in restricting consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity, thus eliminating its significance directly on the issue of the mental element of the crime charged (known in legal shorthand as the *mens rea*, or guilty mind). We hold that there is no violation of due process in either instance.

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*Briefs of *amici curiae* urging reversal were filed for the American Association on Mental Retardation et al. by *James W. Ellis, Michael B. Browde,* and *Richard A. Gonzales;* and for the American Psychiatric Association et al. by *Richard G. Taranto, David W. Ogden,* and *Nathalie F. P. Gilfoyle.*

A brief of *amici curiae* urging affirmance was filed for the Commonwealth of Massachusetts et al. by *Thomas F. Reilly,* Attorney General of Massachusetts, *David M. Lieber,* Assistant Attorney General, and *Dan Schweitzer,* and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Mike Beebe* of Arkansas, *John W. Suthers* of Colorado, *Carl C. Danberg* of Delaware, *Mark J. Bennett* of Hawaii, *Steve Carter* of Indiana, *Michael A. Cox* of Michigan, *Mike McGrath* of Montana, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.,* of Pennsylvania, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, and *Greg Abbott* of Texas.

Briefs of *amici curiae* were filed for the Citizens Commission on Human Rights by *Kendrick Moxon;* and for the Treatment Advocacy Center by *David A. Kotler* and *Megan Elizabeth Zavieh.*

I

In the early hours of June 21, 2000, Officer Jeffrey Moritz of the Flagstaff Police responded in uniform to complaints that a pickup truck with loud music blaring was circling a residential block. When he located the truck, the officer turned on the emergency lights and siren of his marked patrol car, which prompted petitioner Eric Clark, the truck's driver (then 17), to pull over. Officer Moritz got out of the patrol car and told Clark to stay where he was. Less than a minute later, Clark shot the officer, who died soon after but not before calling the police dispatcher for help. Clark ran away on foot but was arrested later that day with gunpowder residue on his hands; the gun that killed the officer was found nearby, stuffed into a knit cap.

Clark was charged with first-degree murder under Ariz. Rev. Stat. Ann. § 13–1105(A)(3) (West Supp. 2005) for intentionally or knowingly killing a law enforcement officer in the line of duty.[1] In March 2001, Clark was found incompetent to stand trial and was committed to a state hospital for treatment, but two years later the same trial court found his competence restored and ordered him to be tried. Clark waived his right to a jury, and the case was heard by the court.

At trial, Clark did not contest the shooting and death, but relied on his undisputed paranoid schizophrenia at the time of the incident in denying that he had the specific intent to shoot a law enforcement officer or knowledge that he was doing so, as required by the statute. Accordingly, the prosecutor offered circumstantial evidence that Clark knew Officer Moritz was a law enforcement officer. The evidence showed that the officer was in uniform at the time, that he caught

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[1] Section 13–1105(A)(3) provides that "[a] person commits first degree murder if . . . [i]ntending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty."

up with Clark in a marked police car with emergency lights and siren going, and that Clark acknowledged the symbols of police authority and stopped. The testimony for the prosecution indicated that Clark had intentionally lured an officer to the scene to kill him, having told some people a few weeks before the incident that he wanted to shoot police officers. At the close of the State's evidence, the trial court denied Clark's motion for judgment of acquittal for failure to prove intent to kill a law enforcement officer or knowledge that Officer Moritz was a law enforcement officer.

In presenting the defense case, Clark claimed mental illness, which he sought to introduce for two purposes. First, he raised the affirmative defense of insanity, putting the burden on himself to prove by clear and convincing evidence, § 13–502(C) (West 2001), that "at the time of the commission of the criminal act [he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong," § 13–502(A).[2] Second, he aimed to rebut the prosecution's evidence of the requisite *mens rea*, that he had acted intentionally or knowingly to kill a law enforcement officer. See, *e. g.*, Record in No. CR 2000–538 (Ariz. Super. Ct.), Doc. 374 (hereinafter Record).

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[2] Section 13–502(A) provides in full that

"A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense. Mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders. Conditions that do not constitute legal insanity include but are not limited to momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct."

A defendant found "guilty except insane" is committed to a state mental-health facility for treatment. See § 13–502(D).

The trial court ruled that Clark could not rely on evidence bearing on insanity to dispute the *mens rea*. The court cited *State* v. *Mott*, 187 Ariz. 536, 931 P. 2d 1046, cert. denied, 520 U. S. 1234 (1997), which "refused to allow psychiatric testimony to negate specific intent," 187 Ariz., at 541, 931 P. 2d, at 1051, and held that "Arizona does not allow evidence of a defendant's mental disorder short of insanity . . . to negate the *mens rea* element of a crime," *ibid.*[3]

As to his insanity, then, Clark presented testimony from classmates, school officials, and his family describing his increasingly bizarre behavior over the year before the shooting. Witnesses testified, for example, that paranoid delusions led Clark to rig a fishing line with beads and wind chimes at home to alert him to intrusion by invaders, and to keep a bird in his automobile to warn of airborne poison. There was lay and expert testimony that Clark thought Flagstaff was populated with "aliens" (some impersonating government agents), the "aliens" were trying to kill him, and bullets were the only way to stop them. A psychiatrist testified that Clark was suffering from paranoid schizophrenia with delusions about "aliens" when he killed Officer Moritz, and he concluded that Clark was incapable of luring the officer or understanding right from wrong and that he was thus insane at the time of the killing. In rebuttal, a psychiatrist for the State gave his opinion that Clark's paranoid schizophrenia did not keep him from appreciating the wrongfulness of his conduct, as shown by his actions before and after the shooting (such as circling the residential block with music blaring as if to lure the police to intervene, evading the police after the shooting, and hiding the gun).

At the close of the defense case consisting of this evidence bearing on mental illness, the trial court denied Clark's re-

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[3] The trial court permitted Clark to introduce this evidence, whether primarily going to insanity or lack of intent, "because it goes to the insanity issue and because we're not in front of a jury." App. 9. It also allowed him to make an offer of proof as to intent to preserve the issue on appeal. *Ibid.*

newed motion for a directed verdict grounded on failure of the prosecution to show that Clark knew the victim was a police officer.[4] The judge then issued a special verdict of first-degree murder, expressly finding that Clark shot and caused the death of Officer Moritz beyond a reasonable doubt and that Clark had not shown that he was insane at the time. The judge noted that though Clark was indisputably afflicted with paranoid schizophrenia at the time of the shooting, the mental illness "did not . . . distort his perception of reality so severely that he did not know his actions were wrong." App. 334. For this conclusion, the judge expressly relied on "the facts of the crime, the evaluations of the experts, [Clark's] actions and behavior both before and after the shooting, and the observations of those that knew [Clark]." *Id.*, at 333. The sentence was life imprisonment without the possibility of release for 25 years.

Clark moved to vacate the judgment and sentence, arguing, among other things, that Arizona's insanity test and its *Mott* rule each violate due process. As to the insanity standard, Clark claimed (as he had argued earlier) that the Arizona Legislature had impermissibly narrowed its standard in 1993 when it eliminated the first part of the two-part insanity test announced in *M'Naghten's Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843). The court denied the motion.

The Court of Appeals of Arizona affirmed Clark's conviction, treating the conclusion on sanity as supported by enough evidence to withstand review for abuse of discretion, and holding the State's insanity scheme consistent with due process. App. 336. As to the latter, the Court of Appeals reasoned that there is no constitutional requirement to recognize an insanity defense at all, the bounds of which are left to the State's discretion. Beyond that, the appellate court followed *Mott*, reading it as barring the trial court's consid-

[4] Clark did not at this time make an additional offer of proof, as contemplated by the trial court when it ruled that it would consider evidence bearing on insanity as to insanity but not as to *mens rea*. See n. 3, *supra*.

eration of evidence of Clark's mental illness and capacity directly on the element of *mens rea*. The Supreme Court of Arizona denied further review.

We granted certiorari to decide whether due process prohibits Arizona from thus narrowing its insanity test or from excluding evidence of mental illness and incapacity due to mental illness to rebut evidence of the requisite criminal intent. 546 U. S. 1060 (2005). We now affirm.

II

Clark first says that Arizona's definition of insanity, being only a fragment of the Victorian standard from which it derives, violates due process. The landmark English rule in *M'Naghten's Case*, *supra*, states that

> "the jurors ought to be told . . . that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." *Id.*, at 210, 8 Eng. Rep., at 722.

The first part asks about cognitive capacity: whether a mental defect leaves a defendant unable to understand what he is doing. The second part presents an ostensibly alternative basis for recognizing a defense of insanity understood as a lack of moral capacity: whether a mental disease or defect leaves a defendant unable to understand that his action is wrong.

When the Arizona Legislature first codified an insanity rule, it adopted the full *M'Naghten* statement (subject to modifications in details that do not matter here):

> "A person is not responsible for criminal conduct if at the time of such conduct the person was suffering from such a mental disease or defect as not to know the na-

> ture and quality of the act or, if such person did know, that such person did not know that what he was doing was wrong." Ariz. Rev. Stat. Ann. § 13–502 (West 1978).[5]

In 1993, the legislature dropped the cognitive incapacity part, leaving only moral incapacity as the nub of the stated definition. See 1993 Ariz. Sess. Laws ch. 256, §§ 2–3.[6] Under current Arizona law, a defendant will not be adjudged insane unless he demonstrates that "at the time of the commission of the criminal act [he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong," Ariz. Rev. Stat. Ann. § 13–502(A) (West 2001).

A

Clark challenges the 1993 amendment excising the express reference to the cognitive incapacity element. He insists that the side-by-side *M'Naghten* test represents the minimum that a government must provide in recognizing an alternative to criminal responsibility on grounds of mental illness or defect, and he argues that elimination of the *M'Naghten* reference to nature and quality "'offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" *Patterson* v.

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[5] This statutory standard followed the Arizona Supreme Court's declaration that Arizona has "uniformly adhered" to the two-part *M'Naghten* standard. *State* v. *Schantz*, 98 Ariz. 200, 206, 403 P. 2d 521, 525 (1965) (citing cases), cert. denied, 382 U. S. 1015 (1966).

[6] This change was accompanied by others, principally an enumeration of mental states excluded from the category of "mental disease or defect," such as voluntary intoxication and other conditions, and a change of the insanity verdict from "not responsible for criminal conduct" by reason of insanity to "guilty except insane." See 1993 Ariz. Sess. Laws ch. 256, §§ 2–3. The 1993 amendments were prompted, at least in part, by an acquittal by reason of insanity in a murder case. See Note, Arizona's Insane Response to Insanity, 40 Ariz. L. Rev. 287, 290 (1998).

New York, 432 U. S. 197, 202 (1977) (quoting *Speiser* v. *Randall*, 357 U. S. 513, 523 (1958)); see also *Leland* v. *Oregon*, 343 U. S. 790, 798 (1952).

The claim entails no light burden, see *Montana* v. *Egelhoff*, 518 U. S. 37, 43 (1996) (plurality opinion), and Clark does not carry it. History shows no deference to *M'Naghten* that could elevate its formula to the level of fundamental principle, so as to limit the traditional recognition of a State's capacity to define crimes and defenses, see *Patterson*, *supra*, at 210; see also *Foucha* v. *Louisiana*, 504 U. S. 71, 96 (1992) (KENNEDY, J., dissenting).

Even a cursory examination of the traditional Anglo-American approaches to insanity reveals significant differences among them, with four traditional strains variously combined to yield a diversity of American standards. The main variants are the cognitive incapacity, the moral incapacity, the volitional incapacity, and the product-of-mental-illness tests.[7] The first two emanate from the alternatives stated in the *M'Naghten* rule. The volitional incapacity or irresistible-impulse test, which surfaced over two centuries ago (first in England,[8] then in this country[9]), asks whether a person was so lacking in volition due to a mental defect or illness that he could not have controlled his actions. And the product-of-mental-illness test was used as early as 1870,[10] and simply asks whether a person's action was a prod-

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[7] "Capacity" is understood to mean the ability to form a certain state of mind or motive, understand or evaluate one's actions, or control them.

[8] See *Queen* v. *Oxford*, 9 Car. & P. 525, 546, 173 Eng. Rep. 941, 950 (1840) ("If some controlling disease was, in truth, the acting power within [the defendant] which he could not resist, then he will not be responsible"); *Hadfield's Case*, 27 How. St. Tr. 1281, 1314–1315, 1354–1355 (K. B. 1800). But cf. *Queen* v. *Burton*, 3 F. & F. 772, 780, 176 Eng. Rep. 354, 357 (1863) (rejecting the irresistible-impulse test as "a most dangerous doctrine").

[9] *E. g.*, *Parsons* v. *State*, 81 Ala. 577, 2 So. 854 (1887); *State* v. *Thompson*, Wright's Ohio Rep. 617 (1834).

[10] *State* v. *Jones*, 50 N. H. 369 (1871); *State* v. *Pike*, 49 N. H. 399 (1870).

uct of a mental disease or defect.[11] Seventeen States and the Federal Government have adopted a recognizable version of the *M'Naghten* test with both its cognitive incapacity and moral incapacity components.[12] One State has adopted

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[11] This distillation of the Anglo-American insanity standards into combinations of four building blocks should not be read to signify that no other components contribute to these insanity standards or that there are no material distinctions between jurisdictions testing insanity with the same building blocks. For example, the jurisdictions limit, in varying degrees, which sorts of mental illness or defect can give rise to a successful insanity defense. Compare, *e. g.*, Ariz. Rev. Stat. Ann. § 13–502(A) (West 2001) (excluding from definition of "mental disease or defect" acute voluntary intoxication, withdrawal from alcohol or drugs, character defects, psychosexual disorders, and impulse control disorders) with, *e. g.*, Ind. Code § 35–41–3–6(b) (West 2004) (excluding from definition of "mental disease or defect" "abnormality manifested only by repeated unlawful or antisocial conduct"). We need not compare the standards under a finer lens because our coarser analysis shows that the standards vary significantly.

[12] See 18 U. S. C. § 17; Ala. Code § 13A–3–1 (1994); Cal. Penal Code Ann. § 25 (West 1999); Colo. Rev. Stat. Ann. § 16–8–101.5 (2005); Fla. Stat. § 775.027 (2003); Iowa Code § 701.4 (2005); Minn. Stat. § 611.026 (2004); *Stevens* v. *State*, 806 So. 2d 1031, 1050–1051 (Miss. 2001); Mo. Rev. Stat. § 562.086 (2000); *State* v. *Harms*, 263 Neb. 814, 836–837, 643 N. W. 2d 359, 378–379 (2002); Nev. Rev. Stat. § 194.010 (2004); *Finger* v. *State*, 117 Nev. 548, 553–577, 27 P. 3d 66, 70–85 (2001); N. J. Stat. Ann. § 2C:4–1 (West 2005); N. Y. Penal Law Ann. § 40.15 (West 2004); *State* v. *Thompson*, 328 N. C. 477, 485–486, 402 S. E. 2d 386, 390 (1991); *Burrows* v. *State*, 640 P. 2d 533, 540–541 (Okla. Crim. App. 1982) (interpreting statutory language excusing from criminal responsibility mentally ill defendants when "at the time of committing the act charged against them they were incapable of knowing its wrongfulness," Okla. Stat., Tit. 21, § 152(4) (West 2001), to mean the two-part *M'Naghten* test); 18 Pa. Cons. Stat. § 315 (2002); Tenn. Code Ann. § 39–11–501 (2003); Wash. Rev. Code § 9A.12.010 (2004). North Dakota has a unique test, which appears to be a modified version of *M'Naghten*, asking whether a defendant "lacks substantial capacity to comprehend the harmful nature or consequences of the conduct, or the conduct is the result of a loss or serious distortion of the individual's capacity to recognize reality," N. D. Cent. Code Ann. § 12.1–04.1–01(1)(a) (Lexis 1997), when "[i]t is an essential element of the crime charged that the individual act willfully," § 12.1–04.1–01(1)(b).

only *M'Naghten*'s cognitive incapacity test,[13] and 10 (including Arizona) have adopted the moral incapacity test alone.[14] Fourteen jurisdictions, inspired by the Model Penal Code,[15] have in place an amalgam of the volitional incapacity test and some variant of the moral incapacity test, satisfaction of either (generally by showing a defendant's substantial lack of capacity) being enough to excuse.[16] Three States combine a full *M'Naghten* test with a volitional incapacity formula.[17] And New Hampshire alone stands by the product-of-mental-illness test.[18] The alternatives are multiplied further by variations in the prescribed insanity verdict: a significant number of these jurisdictions supplement the traditional "not guilty by reason of insanity" verdict with an

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[13] Alaska Stat. § 12.47.010 (2004).

[14] Ariz. Rev. Stat. Ann. § 13–502 (West 2001); Del. Code Ann., Tit. 11, § 401 (1995); Ind. Code § 35–41–3–6 (West 2004); Ill. Comp. Stat., ch. 720, § 5/6–2 (West 2004); La. Stat. Ann. § 14:14 (West 1997); Me. Rev. Stat. Ann., Tit. 17–A, § 39 (2006); Ohio Rev. Code Ann. § 2901.01(A)(14) (Lexis 2006); S. C. Code Ann. § 17–24–10 (2003); S. D. Codified Laws § 22–1–2(20) (2005 Supp. Pamphlet); Tex. Penal Code Ann. § 8.01 (West 2003).

[15] ALI, Model Penal Code § 4.01(1), p. 66 (Proposed Official Draft 1962) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law").

[16] Ark. Code Ann. § 5–2–312 (2006); Conn. Gen. Stat. § 53a–13 (2005); *Malede* v. *United States*, 767 A. 2d 267, 269 (D. C. 2001); Ga. Code Ann. §§ 16–3–2, 16–3–3 (2003); Haw. Rev. Stat. § 704–400 (1993); Ky. Rev. Stat. Ann. § 504.020 (West 2003); Md. Crim. Proc. Code Ann. § 3–109 (Lexis 2001); *Commonwealth* v. *McLaughlin*, 431 Mass. 506, 508, 729 N. E. 2d 252, 255 (2000); Ore. Rev. Stat. § 161.295 (2003); *State* v. *Martinez*, 651 A. 2d 1189, 1193 (R. I. 1994); Vt. Stat. Ann., Tit. 13, § 4801 (1998); *State* v. *Lockhart*, 208 W. Va. 622, 630, 542 S. E. 2d 443, 451 (2000); Wis. Stat. § 971.15 (2003–2004); Wyo. Stat. Ann. § 7–11–304 (2005).

[17] Mich. Comp. Laws Ann. § 768.21a (West 2000); *State* v. *Hartley*, 90 N. M. 488, 490–491, 565 P. 2d 658, 660–661 (1977); *Bennett* v. *Commonwealth*, 29 Va. App. 261, 277, 511 S. E. 2d 439, 446–447 (1999).

[18] *State* v. *Plante*, 134 N. H. 456, 461, 594 A. 2d 1279, 1283 (1991).

alternative of "guilty but mentally ill."[19] Finally, four States have no affirmative insanity defense,[20] though one provides for a "guilty and mentally ill" verdict.[21] These four, like a number of others that recognize an affirmative insanity defense, allow consideration of evidence of mental illness directly on the element of *mens rea* defining the offense.[22]

With this varied background, it is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice. Indeed, the legitimacy of such choice is the more obvious when one considers the interplay of legal concepts of mental illness or deficiency required for an insanity defense, with the medical concepts of mental abnormality that influence the expert opinion testimony by psychologists and psychiatrists commonly introduced to support or contest insanity claims. For medical definitions devised to justify treatment, like legal ones devised to excuse from conventional criminal responsibility, are subject to flux and disagreement. See *infra*, at

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[19] See, *e. g.*, Alaska Stat. §§ 12.47.020(c), 12.47.030 (2004); Del. Code Ann., Tit. 11, § 401 (1995); Ga. Code Ann. § 17–7–131 (2004); Ill. Comp. Stat., ch. 720, § 5/6–2 (West 2004); Ind. Code §§ 35–35–2–1, 35–36–1–1, 35–36–2–3 (West 2004); Ky. Rev. Stat. Ann. § 504.130 (West 2003); Mich. Comp. Laws Ann. § 768.36 (West Supp. 2006); N. M. Stat. Ann. § 31–9–3 (2000); 18 Pa. Cons. Stat. § 314 (2002); S. C. Code Ann. § 17–24–20 (2003); S. D. Codified Laws § 23A–26–14 (2004). Usually, a defendant found "guilty but mentally ill" will receive mental-health treatment until his mental health has rebounded, at which point he must serve the remainder of his imposed sentence. See, *e. g.*, Alaska Stat. § 12.47.050 (2004).

[20] Idaho Code § 18–207 (Lexis 2004); Kan. Stat. Ann. § 22–3220 (1995); Mont. Code Ann. §§ 46–14–102, 46–14–311 (2005); Utah Code Ann. § 76–2–305 (Lexis 2003). We have never held that the Constitution mandates an insanity defense, nor have we held that the Constitution does not so require. This case does not call upon us to decide the matter.

[21] §§ 77–16a–101, 77–16a–103, 77–16a–104 (Lexis 2003).

[22] See statutes cited in n. 20, *supra*.

774–775; cf. *Leland*, 343 U. S., at 800–801 (no due process violation for adopting the *M'Naghten* standard rather than the irresistible-impulse test because scientific knowledge does not require otherwise and choice of test is a matter of policy). There being such fodder for reasonable debate about what the cognate legal and medical tests should be, due process imposes no single canonical formulation of legal insanity.

B

Nor does Arizona's abbreviation of the *M'Naghten* statement raise a proper claim that some constitutional minimum has been shortchanged. Clark's argument of course assumes that Arizona's former statement of the *M'Naghten* rule, with its express alternative of cognitive incapacity, was constitutionally adequate (as we agree). That being so, the abbreviated rule is no less so, for cognitive incapacity is relevant under that statement, just as it was under the more extended formulation, and evidence going to cognitive incapacity has the same significance under the short form as it had under the long.

Though Clark is correct that the application of the moral incapacity test (telling right from wrong) does not necessarily require evaluation of a defendant's cognitive capacity to appreciate the nature and quality of the acts charged against him, see Brief for Petitioner 46–47, his argument fails to recognize that cognitive incapacity is itself enough to demonstrate moral incapacity. Cognitive incapacity, in other words, is a sufficient condition for establishing a defense of insanity, albeit not a necessary one. As a defendant can therefore make out moral incapacity by demonstrating cognitive incapacity, evidence bearing on whether the defendant knew the nature and quality of his actions is both relevant and admissible. In practical terms, if a defendant did not know what he was doing when he acted, he could not have known that he was performing the wrongful act charged as

a crime.[23] Indeed, when the two-part rule was still in effect, the Supreme Court of Arizona held that a jury instruction on insanity containing the moral incapacity part but not a full recitation of the cognitive incapacity part was fine, as the cognitive incapacity part might be "'treated as adding nothing to the requirement that the accused know his act was wrong.'" *State* v. *Chavez*, 143 Ariz. 238, 239, 693 P. 2d 893, 894 (1984) (quoting A. Goldstein, The Insanity Defense 50 (1967)).

The Court of Appeals of Arizona acknowledged as much in this case, too, see App. 350 ("It is difficult to imagine that a defendant who did not appreciate the 'nature and quality' of the act he committed would reasonably be able to perceive that the act was 'wrong'"), and thus aligned itself with the long-accepted understanding that the cognitively incapacitated are a subset of the morally incapacitated within the meaning of the standard *M'Naghten* rule, see, *e. g.*, Goldstein, *supra*, at 51 ("In those situations where the accused does not know the nature and quality of his act, in the broad sense, he will not know that it was wrong, no matter what construction 'wrong' is given"); 1 W. LaFave, Substantive Criminal Law § 7.2(b)(3), p. 536 (2d ed. 2003) ("Many courts feel that knowledge of 'the nature and quality of the act' is the mere equivalent of the ability to know that the act was wrong" (citing cases)); *id.*, § 7.2(b)(4), at 537 ("If the defendant does not know the nature and quality of his act, then quite obviously he does not know that his act is 'wrong,' and this is true without regard to the interpretation given to the word

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[23] He might, of course, have thought delusively he was doing something just as wrongful as the act charged against him, but this is not the test: he must have understood that he was committing the act charged and that it was wrongful, see Ariz. Rev. Stat. Ann. § 13–502(A) (West 2001) ("A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong").

'wrong'"); cf. 1 R. Gerber, Criminal Law of Arizona 502–7, n. 1 (2d ed. 1993).[24]

Clark, indeed, adopted this very analysis himself in the trial court: "[I]f [Clark] did not know he was shooting at a police officer, or believed he had to shoot or be shot, even though his belief was not based in reality, this would establish that he did not know what he was doing was wrong." Record, Doc. 374, at 1. The trial court apparently agreed, for the judge admitted Clark's evidence of cognitive incapacity for consideration under the State's moral incapacity formulation. And Clark can point to no evidence bearing on

[24] We think this logic holds true in the face of the usual rule of statutory construction of "'"giv[ing] effect, if possible, to every clause and word of a statute,"'" *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001) (quoting *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955)); see also 2 J. Sutherland, Statutes and Statutory Construction § 4705 (3d ed. 1943). Insanity standards are formulated to guide the factfinder to determine the blameworthiness of a mentally ill defendant. See, *e. g.*, *Jones* v. *United States*, 463 U. S. 354, 373, n. 4 (1983) (Brennan, J., dissenting). The *M'Naghten* test is a sequential test, first asking the factfinder to conduct the easier enquiry whether a defendant knew the nature and quality of his actions. If not, the defendant is to be considered insane and there is no need to pass to the harder and broader enquiry whether the defendant knew his actions were wrong. And, because, owing to this sequence, the factfinder is to ask whether a defendant lacks moral capacity only when he possesses cognitive capacity, the only defendants who will be found to lack moral capacity are those possessing cognitive capacity. Cf. 2 C. Torcia, Wharton's Criminal Law § 101 (15th ed. 1994). Though, before 1993, Arizona had in place the full *M'Naghten* test with this sequential enquiry, see, *e. g.*, *Schantz*, 98 Ariz., at 207, 403 P. 2d, at 525, it would appear that the legislature eliminated the cognitive capacity part not to change the meaning of the insanity standard but to implement its judgment that a streamlined standard with only the moral capacity part would be easier for the jury to apply, see Arizona House of Representatives, Judiciary Committee Notes 3 (Mar. 18, 1993); 1 R. Gerber, Criminal Law of Arizona 502–6, 502–11 (2d ed. 1993 and Supp. 2000). This is corroborated by the State's choice for many years against revising the applicable recommended jury instruction (enumerating the complete *M'Naghten* test) in order to match the amended statutory standard. See 1 Gerber, *supra*, at 502–6 (2d ed. 1993 and Supp. 2000).

insanity that was excluded. His psychiatric expert and a number of lay witnesses testified to his delusions, and this evidence tended to support a description of Clark as lacking the capacity to understand that the police officer was a human being. There is no doubt that the trial judge considered the evidence as going to an issue of cognitive capacity, for in finding insanity not proven he said that Clark's mental illness "did not . . . distort his perception of reality so severely that he did not know his actions were wrong," App. 334.

We are satisfied that neither in theory nor in practice did Arizona's 1993 abridgment of the insanity formulation deprive Clark of due process.

III

Clark's second claim of a due process violation challenges the rule adopted by the Supreme Court of Arizona in *State* v. *Mott*, 187 Ariz. 536, 931 P. 2d 1046, cert. denied, 520 U. S. 1234 (1997). This case ruled on the admissibility of testimony from a psychologist offered to show that the defendant suffered from battered women's syndrome and therefore lacked the capacity to form the *mens rea* of the crime charged against her. The opinion variously referred to the testimony in issue as "psychological testimony," 187 Ariz., at 541, 931 P. 2d, at 1051, and "expert testimony," *ibid.*, and implicitly equated it with "expert psychiatric evidence," *id.*, at 540, 931 P. 2d, at 1050 (internal quotation marks omitted), and "psychiatric testimony," *id.*, at 541, 931 P. 2d, at 1051.[25] The state court held that testimony of a professional psychologist or psychiatrist about a defendant's mental incapacity owing to mental disease or defect was admissible, and could be considered, only for its bearing on an insanity defense; such evidence could not be considered on the element

[25] We thus think the dissent reads *Mott* too broadly. See *post*, at 786 (opinion of KENNEDY, J.) (no distinction between observation and mental-disease testimony, see *infra*, at 757–758, or lay and expert).

of *mens rea*, that is, what the State must show about a defendant's mental state (such as intent or understanding) when he performed the act charged against him. See *id.*, at 541, 544, 931 P. 2d, at 1051, 1054.[26]

A

Understanding Clark's claim requires attention to the categories of evidence with a potential bearing on *mens rea*. First, there is "observation evidence" in the everyday sense, testimony from those who observed what Clark did and heard what he said; this category would also include testimony that an expert witness might give about Clark's tendency to think in a certain way and his behavioral characteristics. This evidence may support a professional diagnosis of mental disease and in any event is the kind of evidence that can be relevant to show what in fact was on Clark's mind when he fired the gun. Observation evidence in the record covers Clark's behavior at home and with friends, his expressions of belief around the time of the killing that "aliens" were inhabiting the bodies of local people (including government agents),[27] his driving around the neighborhood before the police arrived, and so on. Contrary to the dissent's characterization, see *post*, at 782 (opinion of KENNEDY, J.), obser-

[26] The more natural reading of *Mott* suggests to us that this evidence cannot be considered as to *mens rea* even if the defendant establishes his insanity, though one might read *Mott* otherwise.

[27] Clark's parents testified that, in the months before the shooting and even days beforehand, Clark called them "aliens" and thought that "aliens" were out to get him. See, *e. g.*, Tr. of Bench Trial in No. CR 2000–538, pp. 110–112, 136, 226–228 (Aug. 20, 2003). One night before the shooting, according to Clark's mother, Clark repeatedly viewed a popular film characterized by her as telling a story about "aliens" masquerading as government agents, a story Clark insisted was real despite his mother's protestations to the contrary. See *id.*, at 59–60 (Aug. 21, 2003). And two months after the shooting, Clark purportedly told his parents that his hometown, Flagstaff, was inhabited principally by "aliens," who had to be stopped, and that the only way to stop them was with bullets. See, *e. g.*, *id.*, at 131–132 (Aug. 20, 2003); *id.*, at 24–25 (Aug. 21, 2003).

vation evidence can be presented by either lay or expert witnesses.

Second, there is "mental-disease evidence" in the form of opinion testimony that Clark suffered from a mental disease with features described by the witness. As was true here, this evidence characteristically but not always[28] comes from professional psychologists or psychiatrists who testify as expert witnesses and base their opinions in part on examination of a defendant, usually conducted after the events in question. The thrust of this evidence was that, based on factual reports, professional observations, and tests, Clark was psychotic at the time in question, with a condition that fell within the category of schizophrenia.

Third, there is evidence we will refer to as "capacity evidence" about a defendant's capacity for cognition and moral judgment (and ultimately also his capacity to form *mens rea*). This, too, is opinion evidence. Here, as it usually does,[29] this testimony came from the same experts and concentrated on those specific details of the mental condition that make the difference between sanity and insanity under the Arizona definition.[30] In their respective testimony on

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[28] This is contrary to the dissent's understanding. See *post*, at 782–783 (opinion of KENNEDY, J.).

[29] In conflict with the dissent's characterization, see *post*, at 782 (opinion of KENNEDY, J.), it does not always, however, come from experts.

[30] Arizona permits capacity evidence, see, *e. g.*, *State* v. *Sanchez*, 117 Ariz. 369, 373, 573 P. 2d 60, 64 (1977); see also Ariz. Rule Evid. 704 (2006) (allowing otherwise admissible evidence on testimony "embrac[ing] an ultimate issue to be decided by the trier of fact"), though not every jurisdiction permits such evidence on the ultimate issue of insanity. See, *e. g.*, Fed. Rule Evid. 704(b) ("No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone"); *United States* v. *Dixon*, 185 F. 3d 393, 400 (CA5 1999) (in the

these details the experts disagreed: the defense expert gave his opinion that the symptoms or effects of the disease in Clark's case included inability to appreciate the nature of his action and to tell that it was wrong, whereas the State's psychiatrist was of the view that Clark was a schizophrenic who was still sufficiently able to appreciate the reality of shooting the officer and to know that it was wrong to do that.[31]

A caveat about these categories is in order. They attempt to identify different kinds of testimony offered in this case in terms of explicit and implicit distinctions made in *Mott*. What we can say about these categories goes to their cores, however, not their margins. Exact limits have thus not been worked out in any Arizona law that has come to our attention, and in this case, neither the courts in their rulings nor counsel in objections invoked or required precision in applying the *Mott* rule's evidentiary treatment, as we explain below. Necessarily, then, our own decision can address only core issues, leaving for other cases any due process claims that may be raised about the treatment of evidence whose categorization is subject to dispute.

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face of mental-disease evidence, Rule 704(b) prohibits an expert "from testifying that [the mental-disease evidence] does or does not prevent the defendant from appreciating the wrongfulness of his actions").

[31] Arizona permits evidence bearing on insanity to be presented by either lay or expert witnesses. See *State* v. *Bay*, 150 Ariz. 112, 116, 722 P. 2d 280, 284 (1986). According to *Bay*, "[f]oundationally, a lay witness must have had an opportunity to observe the past conduct and history of a defendant; the fact that he is a lay witness goes not to the admissibility of the testimony but rather to its weight." *Ibid.* (citation omitted); see also *State* v. *Hughes*, 193 Ariz. 72, 83, 969 P. 2d 1184, 1195 (1998). In fact, a defendant can theoretically establish insanity solely via lay testimony. See *Bay*, *supra*, at 116, 722 P. 2d, at 284. But cf. *State* v. *McMurtrey*, 136 Ariz. 93, 100, 664 P. 2d 637, 644 (1983) ("[I]t is difficult to imagine how a defendant could place his or her sanity in issue . . . without expert testimony as to the defendant's state of mind at the time of the crime").

B

It is clear that *Mott* itself imposed no restriction on considering evidence of the first sort, the observation evidence. We read the *Mott* restriction to apply, rather, to evidence addressing the two issues in testimony that characteristically comes only from psychologists or psychiatrists qualified to give opinions as expert witnesses: mental-disease evidence (whether at the time of the crime a defendant suffered from a mental disease or defect, such as schizophrenia) and capacity evidence (whether the disease or defect left him incapable of performing or experiencing a mental process defined as necessary for sanity such as appreciating the nature and quality of his act and knowing that it was wrong).

Mott was careful to distinguish this kind of opinion evidence from observation evidence generally and even from observation evidence that an expert witness might offer, such as descriptions of a defendant's tendency to think in a certain way or his behavioral characteristics; the Arizona court made it clear that this sort of testimony was perfectly admissible to rebut the prosecution's evidence of *mens rea*, 187 Ariz., at 544, 931 P. 2d, at 1054. Thus, only opinion testimony going to mental defect or disease, and its effect on the cognitive or moral capacities on which sanity depends under the Arizona rule, is restricted.

In this case, the trial court seems to have applied the *Mott* restriction to all evidence offered by Clark for the purpose of showing what he called his inability to form the required *mens rea*, see, *e. g.*, Record, Doc. 406, at 7–10 (that is, an intent to kill a police officer on duty, or an understanding that he was engaging in the act of killing such an officer, see Ariz. Rev. Stat. Ann. § 13–1105(A)(3) (West Supp. 2005)). Thus, the trial court's restriction may have covered not only mental-disease and capacity evidence as just defined, but also observation evidence offered by lay (and expert) witnesses who described Clark's unusual behavior. Clark's objection to the application of the *Mott* rule does not, however, turn

on the distinction between lay and expert witnesses or the kinds of testimony they were competent to present.[32]

C

There is some, albeit limited, disagreement between the dissent and ourselves about the scope of the claim of error properly before us. To start with matters of agreement, all Members of the Court agree that Clark's general attack on the *Mott* rule covers its application in confining consideration of capacity evidence to the insanity defense.

In practical terms, our agreement on issues presented extends to a second point. JUSTICE KENNEDY understands that Clark raised an objection to confining mental-disease evidence to the insanity issue. As he sees it, Clark in effect claimed that in dealing with the issue of *mens rea* the trial judge should have considered expert testimony on what may characteristically go through the mind of a schizophrenic, when the judge considered what in fact was in Clark's mind at the time of the shooting. See *post*, at 783 (dissenting opinion) ("[T]he opinion that Clark had paranoid schizophrenia—an opinion shared by experts for both the prosecution and defense—bears on efforts to determine, as a factual matter, whether he knew he was killing a police officer"). He thus understands that defense counsel claimed a right to rebut the State's *mens rea* demonstration with testimony about how schizophrenics may hallucinate voices and other sounds, about their characteristic failure to distinguish the content of their imagination from what most people perceive as exterior reality, and so on. It is important to be clear that this supposed objection was not about dealing with tes-

[32] With respect to "the limited factual issues the trial court held it could consider under [Ariz. Rev. Stat. Ann.] § 13–502 and *Mott*, defense counsel made no additional 'offer of proof' at the conclusion of the case but preserved [Clark's] legal contentions by asking the court to consider all of the evidence presented in determining whether the state had proved its case." Brief for Petitioner 10, n. 20 (citation omitted).

timony based on observation of Clark showing that he had auditory hallucinations when he was driving around, or failed in fact to appreciate objective reality when he shot; this objection went to use of testimony about schizophrenics, not about Clark in particular. While we might dispute how clearly Clark raised this objection, we have no doubt that the objection falls within a general challenge to the *Mott* rule; we understand that *Mott* is meant to confine to the insanity defense any consideration of characteristic behavior associated with mental disease, see 187 Ariz., at 544, 931 P. 2d, at 1054 (contrasting *State* v. *Christensen*, 129 Ariz. 32, 628 P. 2d 580 (1981), and *State* v. *Gonzales*, 140 Ariz. 349, 681 P. 2d 1368 (1984)). We will therefore assume for argument that Clark raised this claim, as we consider the due process challenge to the *Mott* rule.

The point on which we disagree with the dissent, however, is this: did Clark apprise the Arizona courts that he believed the trial judge had erroneously limited the consideration of observation evidence, whether from lay witnesses like Clark's mother or (possibly) the expert witnesses who observed him? This sort of evidence was not covered by the *Mott* restriction, and confining it to the insanity issue would have been an erroneous application of *Mott* as a matter of Arizona law. For the following reasons we think no such objection was made in a way the Arizona courts could have understood it, and that no such issue is before us now. We think the only issue properly before us is the challenge to *Mott* on due process grounds, comprising objections to limits on the use of mental-disease and capacity evidence.

It is clear that the trial judge intended to apply *Mott:*

> "[R]ecognizing that much of the evidence that [the defense is] going to be submitting, in fact all of it, as far as I know . . . that has to do with the insanity could also arguably be made along the lines of the Mott issues as to form and intent and his capacity for the intent. I'm going to let you go ahead and get all that stuff in because

> it goes to the insanity issue and because we're not in front of a jury. At the end, I'll let you make an offer of proof as to the intent, the Mott issues, but I still think the supreme court decision is the law of the land in this state." App. 9.

At no point did the trial judge specify any particular evidence that he refused to consider on the *mens rea* issue. Nor did defense counsel specify any observation or other particular evidence that he claimed was admissible but wrongly excluded on the issue of *mens rea*, so as to produce a clearer ruling on what evidence was being restricted on the authority of *Mott* and what was not. He made no "offer of proof" in the trial court;[33] and although his brief in the Arizona Court of Appeals stated at one point that it was not inconsistent with *Mott* to consider nonexpert evidence indicating mental illness on the issue of *mens rea*, and argued that the trial judge had failed to do so, Appellant's Opening Brief in No. 1CA–CR–03–0851 etc., pp. 48–49 (hereinafter Appellant's Opening Brief), he was no more specific than that, see, *e. g.*, *id.*, at 52 ("The Court's ruling in *Mott* and the trial court's refusal to consider whether as a result of suffering from paranoid schizophrenia [Clark] could not formulate the *mens rea* necessary for first degree murder violated his right to due process"). Similarly, we read the Arizona Court of Appeals to have done nothing more than rely on *Mott* to reject the claim that due process forbids restricting evidence bearing on *"[a]bility to [f]orm [m]ens [r]ea,"* App. 351 (em-

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[33] We do not agree with the State's argument that the failure to make an offer of proof, see n. 4, *supra*, is a bar to pressing Clark's claim about the admissibility of mental-illness or capacity evidence as to *mens rea*, see Brief for Respondent 27–29, especially when the Arizona Court of Appeals rejected Clark's argument on the merits rather than clearly on this ground, see App. 351–353; see also *Michigan* v. *Long*, 463 U. S. 1032, 1042 (1983) ("[I]t is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and . . . it fairly appears that the state court rested its decision primarily on federal law").

phasis in original), (*i. e.*, mental-disease and capacity evidence) to the insanity determination. See *id.*, at 351–353.

This failure in the state courts to raise any clear claim about observation evidence, see Appellant's Opening Brief 46–52, is reflected in the material addressed to us, see Brief for Petitioner 13–32. In this Court both the question presented and the following statement of his position were couched in similarly worded general terms:

> "I. ERIC WAS DENIED DUE PROCESS WHEN THE TRIAL COURT REFUSED TO CONSIDER EVIDENCE OF HIS SEVERE MENTAL ILLNESS IN DETERMINING FACTUALLY WHETHER THE PROSECUTION PROVED THE MENTAL ELEMENTS OF THE CRIME CHARGED." *Id.*, at 13.

But as his counsel made certain beyond doubt in his reply brief,

> "Eric's Point I is and always has been an attack on the rule of *State* v. *Mott*, which both courts below held applicable and binding. *Mott* announced a categorical 'rejection of the use of psychological testimony to challenge the *mens rea* element of a crime,' and upheld this rule against federal due process challenge." Reply Brief for Petitioner 2 (citations omitted).

This explanation is supported by other statements in Clark's briefs in both the State Court of Appeals and this Court, replete with the consistently maintained claim that it was error to limit evidence of mental illness and incapacity to its bearing on the insanity defense, excluding it from consideration on the element of *mens rea*. See, *e. g.*, Appellant's Opening Brief 46, 47, 51; Brief for Petitioner 11, 13, 16, 20–23.

In sum, the trial court's ruling, with its uncertain edges, may have restricted observation evidence admissible on *mens rea* to the insanity defense alone, but we cannot be

sure.[34] But because a due process challenge to such a restriction of observation evidence was, by our measure, neither pressed nor passed upon in the Arizona Court of Appeals, we do not consider it. See, *e. g.*, *Kentucky* v. *Stincer*, 482 U. S. 730, 747, n. 22 (1987); *Illinois* v. *Gates*, 462 U. S. 213, 217–224 (1983). What we do know, and now consider, is Clark's claim that *Mott* denied due process because it "*preclude[d] Eric from contending that . . . factual inferences*" of the "mental states which were necessary elements of the crime charged" "*should not be drawn* because the behavior was explainable, instead, as a manifestation of his chronic paranoid schizophrenia." Brief for Petitioner 13 (emphasis in original). We consider the claim, as Clark otherwise puts it, that "Arizona's prohibition of 'diminished capacity' evidence by criminal defendants violates" due process, *ibid.*

D

Clark's argument that the *Mott* rule violates the Fourteenth Amendment guarantee of due process turns on the application of the presumption of innocence in criminal cases, the presumption of sanity, and the principle that a criminal defendant is entitled to present relevant and favorable evidence on an element of the offense charged against him.

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[34] We therefore have no reason to believe that the courts of Arizona would have failed to restrict their application of *Mott* to the professional testimony the *Mott* opinion was stated to cover, if Clark's counsel had specified any observation evidence he claimed to be generally admissible and relevant to *mens rea*. Nothing that we hold here is authority for restricting a factfinder's consideration of observation evidence indicating state of mind at the time of a criminal offense (conventional *mens rea* evidence) as distinct from professional mental-disease or capacity evidence going to ability to form a certain state of mind during a period that includes the time of the offense charged. And, of course, nothing held here prevents Clark from raising this discrete claim when the case returns to the courts of Arizona, if consistent with the State's procedural rules.

1

The first presumption is that a defendant is innocent unless and until the government proves beyond a reasonable doubt each element of the offense charged, see *Patterson*, 432 U. S., at 210–211; *In re Winship*, 397 U. S. 358, 361–364 (1970), including the mental element or *mens rea*. Before the last century, the *mens rea* required to be proven for particular offenses was often described in general terms like "malice," see, *e. g.*, *In re Eckart*, 166 U. S. 481 (1897); 4 W. Blackstone, Commentaries *21 ("[A]n unwarrantable act without a vicious will is no crime at all"), but the modern tendency has been toward more specific descriptions, as shown in the Arizona statute defining the murder charged against Clark: the State had to prove that in acting to kill the victim, Clark intended to kill a law enforcement officer on duty or knew that the victim was such an officer on duty. See generally Gardner, The *Mens Rea* Enigma: Observations on the Role of Motive in the Criminal Law Past and Present, 1993 Utah L. Rev. 635. As applied to *mens rea* (and every other element), the force of the presumption of innocence is measured by the force of the showing needed to overcome it, which is proof beyond a reasonable doubt that a defendant's state of mind was in fact what the charge states. See *Winship*, *supra*, at 361–363.

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The presumption of sanity is equally universal in some variety or other, being (at least) a presumption that a defendant has the capacity to form the *mens rea* necessary for a verdict of guilt and the consequent criminal responsibility. See *Leland*, 343 U. S., at 799; *Davis* v. *United States*, 160 U. S. 469, 486–487 (1895); *M'Naghten's Case*, 10 Cl. & Fin., at 210, 8 Eng. Rep., at 722; see generally 1 LaFave, Substantive Criminal Law § 8.3(a), at 598–599, and n. 1. This presumption dispenses with a requirement on the government's part

to include as an element of every criminal charge an allegation that the defendant had such a capacity.[35] The force of this presumption, like the presumption of innocence, is measured by the quantum of evidence necessary to overcome it; unlike the presumption of innocence, however, the force of the presumption of sanity varies across the many state and federal jurisdictions, and prior law has recognized considerable leeway on the part of the legislative branch in defining the presumption's strength through the kind of evidence and degree of persuasiveness necessary to overcome it, see *Fisher* v. *United States*, 328 U. S. 463, 466–476 (1946).[36]

There are two points where the sanity or capacity presumption may be placed in issue. First, a State may allow a defendant to introduce (and a factfinder to consider) evidence of mental disease or incapacity for the bearing it can have on the government's burden to show *mens rea*. See, *e. g.*, *State* v. *Perez*, 882 A. 2d 574, 584 (R. I. 2005).[37] In such States the evidence showing incapacity to form the guilty state of mind, for example, qualifies the probative force of other evidence, which considered alone indicates that the defendant actually formed the guilty state of mind. If it is shown that a defendant with mental disease thinks all blond people are robots, he could not have intended to kill a person when he shot a man with blond hair, even though he seemed

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[35] A legislature is nonetheless free to require affirmative proof of sanity by the way it describes a criminal offense, see *Dixon* v. *United States*, *ante*, at 9–12.

[36] Although a desired evidentiary use is restricted, that is not equivalent to a *Sandstrom* presumption. See *Sandstrom* v. *Montana*, 442 U. S. 510, 514–524 (1979) (due process forbids use of presumption that relieves the prosecution of burden of proving mental state by inference of intent from an act).

[37] In fact, Oregon had this scheme in place when we decided *Leland* v. *Oregon*, 343 U. S. 790, 794–796 (1952). We do not, however, read any part of *Leland* to require as a matter of due process that evidence of incapacity be considered to rebut the *mens rea* element of a crime.

to act like a man shooting another man.[38] In jurisdictions that allow mental-disease and capacity evidence to be considered on par with any other relevant evidence when deciding whether the prosecution has proven *mens rea* beyond a reasonable doubt, the evidence of mental disease or incapacity need only support what the factfinder regards as a reasonable doubt about the capacity to form (or the actual formation of) the *mens rea*, in order to require acquittal of the charge. Thus, in these States the strength of the presumption of sanity is no greater than the strength of the evidence of abnormal mental state that the factfinder thinks is enough to raise a reasonable doubt.

The second point where the force of the presumption of sanity may be tested is in the consideration of a defense of insanity raised by a defendant. Insanity rules like *M'Naghten* and the variants discussed in Part II, *supra*, are attempts to define, or at least to indicate, the kinds of mental differences that overcome the presumption of sanity or capacity and therefore excuse a defendant from customary criminal responsibility, see *Jones* v. *United States*, 463 U. S. 354, 373, n. 4 (1983) (Brennan, J., dissenting); D. Hermann, The Insanity Defense: Philosophical, Historical and Legal Perspectives 4 (1983) ("A central significance of the insanity defense . . .

[38] We reject the State's argument that *mens rea* and insanity, as currently understood, are entirely distinguishable, so that mental-disease and capacity evidence relevant to insanity is simply irrelevant to *mens rea*. Not only does evidence accepted as showing insanity trump *mens rea*, but evidence of behavior close to the time of the act charged may indicate both the actual state of mind at that time and also an enduring incapacity to form the criminal state of mind necessary to the offense charged. See Brief for American Psychiatric Association et al. as *Amici Curiae* 12–13; Arenella, The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage, 77 Colum. L. Rev. 827, 834–835 (1977); cf. *Powell* v. *Texas*, 392 U. S. 514, 535–536 (1968) (plurality opinion) (the "doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress" are a "collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds").

is the separation of nonblameworthy from blameworthy offenders"), even if the prosecution has otherwise overcome the presumption of innocence by convincing the factfinder of all the elements charged beyond a reasonable doubt. The burden that must be carried by a defendant who raises the insanity issue, again, defines the strength of the sanity presumption. A State may provide, for example, that whenever the defendant raises a claim of insanity by some quantum of credible evidence, the presumption disappears and the government must prove sanity to a specified degree of certainty (whether beyond reasonable doubt or something less). See, *e. g.*, *Commonwealth* v. *Keita*, 429 Mass. 843, 846, 712 N. E. 2d 65, 68 (1999). Or a jurisdiction may place the burden of persuasion on a defendant to prove insanity as the applicable law defines it, whether by a preponderance of the evidence or to some more convincing degree, see Ariz. Rev. Stat. Ann. § 13–502(C) (West 2001); *Leland*, 343 U. S., at 798. In any case, the defendant's burden defines the presumption of sanity, whether that burden be to burst a bubble or to show something more.

3

The third principle implicated by Clark's argument is a defendant's right as a matter of simple due process to present evidence favorable to himself on an element that must be proven to convict him.[39] As already noted, evidence tending to show that a defendant suffers from mental disease and lacks capacity to form *mens rea* is relevant to rebut evidence that he did in fact form the required *mens rea* at the time in question; this is the reason that Clark claims a right to require the factfinder in this case to consider testimony

[39] Clark's argument assumes that Arizona's rule is a rule of evidence, rather than a redefinition of *mens rea*, see *Montana* v. *Egelhoff*, 518 U. S. 37, 58–59 (1996) (GINSBURG, J., concurring in judgment); *id.*, at 71 (O'Connor, J., dissenting). We have no reason to view the rule otherwise, and on this assumption, it does not violate due process, see *infra*, at 773–779.

about his mental illness and his incapacity directly, when weighing the persuasiveness of other evidence tending to show *mens rea*, which the prosecution has the burden to prove.

As Clark recognizes, however, the right to introduce relevant evidence can be curtailed if there is a good reason for doing that. "While the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes* v. *South Carolina*, 547 U. S. 319, 326 (2006); see *Crane* v. *Kentucky*, 476 U. S. 683, 689–690 (1986) (permitting exclusion of evidence that "poses an undue risk of 'harassment, prejudice, [or] confusion of the issues'" (quoting *Delaware* v. *Van Arsdall*, 475 U. S. 673, 679 (1986))); see also *Egelhoff*, 518 U. S. 37; *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973). And if evidence may be kept out entirely, its consideration may be subject to limitation, which Arizona claims the power to impose here. State law says that evidence of mental disease and incapacity may be introduced and considered, and if sufficiently forceful to satisfy the defendant's burden of proof under the insanity rule it will displace the presumption of sanity and excuse from criminal responsibility. But mental-disease and capacity evidence may be considered only for its bearing on the insanity defense, and it will avail a defendant only if it is persuasive enough to satisfy the defendant's burden as defined by the terms of that defense. The mental-disease and capacity evidence is thus being channeled or restricted to one issue and given effect only if the defendant carries the burden to convince the factfinder of insanity; the evidence is not being excluded entirely, and the question is whether reasons for requiring it to be channeled and restricted are good enough to

satisfy the standard of fundamental fairness that due process requires. We think they are.

E

1

The first reason supporting the *Mott* rule is Arizona's authority to define its presumption of sanity (or capacity or responsibility) by choosing an insanity definition, as discussed in Part II, *supra*, and by placing the burden of persuasion on defendants who claim incapacity as an excuse from customary criminal responsibility. No one, certainly not Clark here, denies that a State may place a burden of persuasion on a defendant claiming insanity, see *Leland*, *supra*, at 797–799 (permitting a State, consistent with due process, to require the defendant to bear this burden). And Clark presses no objection to Arizona's decision to require persuasion to a clear and convincing degree before the presumption of sanity and normal responsibility is overcome. See Brief for Petitioner 18, n. 25.

But if a State is to have this authority in practice as well as in theory, it must be able to deny a defendant the opportunity to displace the presumption of sanity more easily when addressing a different issue in the course of the criminal trial. Yet, as we have explained, just such an opportunity would be available if expert testimony of mental disease and incapacity could be considered for whatever a factfinder might think it was worth on the issue of *mens rea*.[40] As we mentioned, the presumption of sanity would then be only as strong as the evidence a factfinder would accept as enough to raise a reasonable doubt about *mens rea* for the crime charged; once reasonable doubt was found, acquittal would

[40] Cf. *post*, at 783 (KENNEDY, J., dissenting) ("The psychiatrist's explanation of Clark's condition was essential to understanding how he processes sensory data and therefore to deciding what information was in his mind at the time of the shooting. Simply put, knowledge relies on cognition, and cognition can be affected by schizophrenia").

be required, and the standards established for the defense of insanity would go by the boards.

Now, a State is of course free to accept such a possibility in its law. After all, it is free to define the insanity defense by treating the presumption of sanity as a bursting bubble, whose disappearance shifts the burden to the prosecution to prove sanity whenever a defendant presents any credible evidence of mental disease or incapacity. In States with this kind of insanity rule, the legislature may well be willing to allow such evidence to be considered on the *mens rea* element for whatever the factfinder thinks it is worth. What counts for due process, however, is simply that a State that wishes to avoid a second avenue for exploring capacity, less stringent for a defendant, has a good reason for confining the consideration of evidence of mental disease and incapacity to the insanity defense.

It is obvious that Arizona's *Mott* rule reflects such a choice. The State Supreme Court pointed out that the State had declined to adopt a defense of diminished capacity (allowing a jury to decide when to excuse a defendant because of greater than normal difficulty in conforming to the law).[41] The court reasoned that the State's choice would be undercut if evidence of incapacity could be considered for

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[41] Though the term "diminished capacity" has been given different meanings, see, *e. g.*, Morse, Undiminished Confusion in Diminished Capacity, 75 J. Crim. L. & C. 1 (1984) ("The diminished capacity doctrine allows a criminal defendant to introduce evidence of mental abnormality at trial either to negate a mental element of the crime charged, thereby exonerating the defendant of that charge, or to reduce the degree of crime for which the defendant may be convicted, even if the defendant's conduct satisfied all the formal elements of a higher offense"), California, a jurisdiction with which the concept has traditionally been associated, understood it to be simply a "'showing that the defendant's mental capacity was reduced by mental illness, mental defect or intoxication,'" *People* v. *Berry*, 18 Cal. 3d 509, 517, 556 P. 2d 777, 781 (1976) (quoting *People* v. *Castillo*, 70 Cal. 2d 264, 270, 449 P. 2d 449, 452 (1969); emphasis deleted), abrogated by Cal. Penal Code Ann. §§ 25(a), 28(a)–(b), 29 (West 1999 and Supp. 2006).

whatever a jury might think sufficient to raise a reasonable doubt about *mens rea*, even if it did not show insanity. 187 Ariz., at 541, 931 P. 2d, at 1051. In other words, if a jury were free to decide how much evidence of mental disease and incapacity was enough to counter evidence of *mens rea* to the point of creating a reasonable doubt, that would in functional terms be analogous to allowing jurors to decide upon some degree of diminished capacity to obey the law, a degree set by them, that would prevail as a stand-alone defense.[42]

2

A State's insistence on preserving its chosen standard of legal insanity cannot be the sole reason for a rule like *Mott*, however, for it fails to answer an objection the dissent makes in this case. See *post*, at 789–797 (opinion of KENNEDY, J.). An insanity rule gives a defendant already found guilty the opportunity to excuse his conduct by showing he was insane when he acted, that is, that he did not have the mental capacity for conventional guilt and criminal responsibility. But, as the dissent argues, if the same evidence that affirmatively shows he was not guilty by reason of insanity (or "guilty except insane" under Arizona law, Ariz. Rev. Stat. Ann. § 13–502(A) (West 2001)) also shows it was at least doubtful that he could form *mens rea*, then he should not be found guilty in the first place; it thus violates due process when the State

[42] It is beyond question that Arizona may preclude such a defense, see *Fisher* v. *United States*, 328 U. S. 463, 466–476 (1946), and there is no doubt that the Arizona Legislature meant to do so, see Ariz. Rev. Stat. Ann. § 13–502(A) (West 2001) ("Mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders. Conditions that do not constitute legal insanity include but are not limited to momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct").

impedes him from using mental-disease and capacity evidence directly to rebut the prosecution's evidence that he did form *mens rea*.

Are there, then, characteristics of mental-disease and capacity evidence giving rise to risks that may reasonably be hedged by channeling the consideration of such evidence to the insanity issue on which, in States like Arizona, a defendant has the burden of persuasion? We think there are: in the controversial character of some categories of mental disease, in the potential of mental-disease evidence to mislead, and in the danger of according greater certainty to capacity evidence than experts claim for it.

To begin with, the diagnosis may mask vigorous debate within the profession about the very contours of the mental disease itself. See, *e. g.*, American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders xxxiii (4th ed. text rev. 2000) (hereinafter DSM–IV–TR) ("DSM–IV reflects a consensus about the classification and diagnosis of mental disorders derived at the time of its initial publication. New knowledge generated by research or clinical experience will undoubtedly lead to an increased understanding of the disorders included in DSM–IV, to the identification of new disorders, and to the removal of some disorders in future classifications. The text and criteria sets included in DSM–IV will require reconsideration in light of evolving new information"); P. Caplan, They Say You're Crazy: How the World's Most Powerful Psychiatrists Decide Who's Normal (1995) (criticism by former consultant to the DSM against some of the DSM's categories). And Members of this Court have previously recognized that the end of such debate is not imminent. See *Jones*, 463 U. S., at 365, n. 13 ("'The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment'" (quoting *Greenwood* v. *United States*, 350 U. S. 366, 375 (1956))); *Powell* v. *Texas*, 392 U. S. 514, 537 (1968) (plurality opinion) ("It

is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear . . . to doctors"). Though we certainly do not "condem[n mental-disease evidence] wholesale," Brief for American Psychiatric Association et al. as *Amici Curiae* 15, the consequence of this professional ferment is a general caution in treating psychological classifications as predicates for excusing otherwise criminal conduct.

Next, there is the potential of mental-disease evidence to mislead jurors (when they are the factfinders) through the power of this kind of evidence to suggest that a defendant suffering from a recognized mental disease lacks cognitive, moral, volitional, or other capacity, when that may not be a sound conclusion at all. Even when a category of mental disease is broadly accepted and the assignment of a defendant's behavior to that category is uncontroversial, the classification may suggest something very significant about a defendant's capacity, when in fact the classification tells us little or nothing about the ability of the defendant to form *mens rea* or to exercise the cognitive, moral, or volitional capacities that define legal sanity.[43] See DSM–IV–TR xxxii–xxxiii ("When the DSM–IV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations, the clinical diagnosis of a DSM–IV mental disorder is not sufficient to establish the existence for legal

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[43] Our observation about the impact of mental-disease evidence on understandings of capacity in no way undermines the assertion by the American Psychiatric Association, the American Psychological Association, and the American Academy of Psychiatry in this case that "[e]xpert evidence of mental disorders . . . is . . . relevant to the mental-state issues raised by *mens rea* requirements," Brief for American Psychiatric Association et al. as *Amici Curiae* 15.

purposes of . . . 'mental diseas[e]' or 'mental defect.' In determining whether an individual meets a specified legal standard (e. g., for . . . criminal responsibility . . .), additional information is usually required beyond that contained in the DSM–IV diagnosis"). The limits of the utility of a professional disease diagnosis are evident in the dispute between the two testifying experts in this case; they agree that Clark was schizophrenic, but they come to opposite conclusions on whether the mental disease in his particular case left him bereft of cognitive or moral capacity. Evidence of mental disease, then, can easily mislead; it is very easy to slide from evidence that an individual with a professionally recognized mental disease is very different, into doubting that he has the capacity to form *mens rea*, whereas that doubt may not be justified. And of course, in the cases mentioned before, in which the categorization is doubtful or the category of mental disease is itself subject to controversy, the risks are even greater that opinions about mental disease may confuse a jury into thinking the opinions show more than they do. Because allowing mental-disease evidence on *mens rea* can thus easily mislead, it is not unreasonable to address that tendency by confining consideration of this kind of evidence to insanity, on which a defendant may be assigned the burden of persuasion.

There are, finally, particular risks inherent in the opinions of the experts who supplement the mental-disease classifications with opinions on incapacity: on whether the mental disease rendered a particular defendant incapable of the cognition necessary for moral judgment or *mens rea* or otherwise incapable of understanding the wrongfulness of the conduct charged. Unlike observational evidence bearing on *mens rea*, capacity evidence consists of judgment, and judgment fraught with multiple perils: a defendant's state of mind at the crucial moment can be elusive no matter how conscientious the enquiry, and the law's categories that set the terms of the capacity judgment are not the categories of psychology

that govern the expert's professional thinking. Although such capacity judgments may be given in the utmost good faith, their potentially tenuous character is indicated by the candor of the defense expert in this very case. Contrary to the State's expert, he testified that Clark lacked the capacity to appreciate the circumstances realistically and to understand the wrongfulness of what he was doing, App. 48–49, but he said that "no one knows exactly what was on [his] mind" at the time of the shooting, *id.*, at 48. And even when an expert is confident that his understanding of the mind is reliable, judgment addressing the basic categories of capacity requires a leap from the concepts of psychology, which are devised for thinking about treatment, to the concepts of legal sanity, which are devised for thinking about criminal responsibility. See Insanity Defense Work Group, American Psychiatric Association Statement on the Insanity Defense, 140 Am. J. Psychiatry 681, 686 (1983), reprinted in 2 The Role of Mental Illness in Criminal Trials 117, 122 (J. Moriarty ed. 2001) ("The American Psychiatric Association is not opposed to legislatures restricting psychiatric testimony about the . . . ultimate legal issues concerning the insanity defense. . . . When . . . 'ultimate issue' questions are formulated by the law and put to the expert witness who must then say 'yea' or 'nay,' then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the *probable relationship* between medical concepts and legal or moral constructs such as free will. These impermissible leaps in logic made by expert witnesses confuse the jury. . . . This state of affairs does considerable injustice to psychiatry and, we believe, possibly to criminal defendants. These psychiatric disagreements . . . cause less than fully understanding juries or the public to conclude that psychiatrists cannot agree. In fact, in many criminal insanity trials both prosecution and defense psychiatrists do agree about the nature and even the extent of mental disorder ex-

hibited by the defendant at the time of the act" (emphasis in original; footnote omitted)); DSM–IV–TR xxxii–xxxiii; P. Giannelli & E. Imwinkelried, Scientific Evidence § 9–3(B), p. 286 (1986) ("[N]o matter how the test for insanity is phrased, a psychiatrist or psychologist is no more qualified than any other person to give an opinion about whether a particular defendant's mental condition satisfies the legal test for insanity"); cf. R. Slovenko, Psychiatry and Criminal Culpability 55 (1995) ("The scope of the DSM is wide-ranging and includes 'conduct disorders' but 'evil' is not mentioned"). In sum, these empirical and conceptual problems add up to a real risk that an expert's judgment in giving capacity evidence will come with an apparent authority that psychologists and psychiatrists do not claim to have. We think that this risk, like the difficulty in assessing the significance of mental-disease evidence, supports the State's decision to channel such expert testimony to consideration on the insanity defense, on which the party seeking the benefit of this evidence has the burden of persuasion.

It bears repeating that not every State will find it worthwhile to make the judgment Arizona has made, and the choices the States do make about dealing with the risks posed by mental-disease and capacity evidence will reflect their varying assessments about the presumption of sanity as expressed in choices of insanity rules.[44] The point here simply is that Arizona has sensible reasons to assign the risks as it has done by channeling the evidence.[45]

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[44] A State in which the burden of persuasion as to a defendant's sanity lies with the prosecution might also be justified in restricting mental-disease and capacity evidence to insanity determinations owing to the potential of mental-disease evidence to mislead and the risk of misjudgment inherent in capacity evidence. We need not, in the context of this case, address that issue.

[45] Arizona's rule is supported by a further practical reason, though not as weighty as those just considered. As mentioned before, if substantial mental-disease and capacity evidence is accepted as rebutting *mens rea* in a given case, the affirmative defense of insanity will probably not be

F

Arizona's rule serves to preserve the State's chosen standard for recognizing insanity as a defense and to avoid confusion and misunderstanding on the part of jurors.[46] For these reasons, there is no violation of due process under *Chambers* and its progeny, and no cause to claim that channeling evidence on mental disease and capacity offends any "'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" *Patterson*, 432 U. S., at 202 (quoting *Speiser*, 357 U. S., at 523).

* * *

The judgment of the Court of Appeals of Arizona is, accordingly, affirmed.

It is so ordered.

JUSTICE BREYER, concurring in part and dissenting in part.

As I understand the Court's opinion, it distinguishes among three categories of evidence related to insanity: (1) fact-related evidence as to the defendant's specific state of mind at the time of the crime, *e. g.*, evidence that shows he

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reached or ruled upon; the defendant will simply be acquitted (or perhaps convicted of a lesser included offense). If an acquitted defendant suffers from a mental disease or defect that makes him dangerous, he will neither be confined nor treated psychiatrically unless a judge so orders after some independent commitment proceeding. But if a defendant succeeds in showing himself insane, Arizona law (and presumably that of every other State with an insanity rule) will require commitment and treatment as a consequence of that finding without more. It makes sense, then, to channel capacity evidence to the issue structured to deal with mental incapacity when such a claim is raised successfully. See, *e. g.*, *Jones*, 463 U. S., at 368 ("The purpose of commitment following an insanity acquittal . . . is to treat the individual's mental illness and protect him and society from his potential dangerousness").

[46] The rule also deals in a practical way with those whose insanity has been shown to make them dangerous to others. See n. 45, *supra*.

thought the policeman was not a human being; (2) expert opinion evidence that the defendant suffered from a mental disease that would have affected his capacity to form an intent to kill a policeman, *e. g.*, that he suffers from a disease of a kind where powerful voices command the sufferer to kill; and (3) expert opinion evidence that the defendant was legally insane, *e. g.*, evidence that he did not know right from wrong. *Ante*, at 757–759.

I agree with the Court's basic categorization. I also agree that the Constitution permits a State to provide for consideration of the second and third types of evidence solely in conjunction with the insanity defense. A State might reasonably fear that, without such a rule, the types of evidence as to intent would become confused in the jury's mind, indeed that in some cases the insanity question would displace the intent question as the parties litigate both simultaneously.

Nonetheless, I believe the distinction among these kinds of evidence will be unclear in some cases. And though I accept the majority's reading of the record, I remain concerned as to whether the lower courts, in setting forth and applying *State* v. *Mott*, 187 Ariz. 536, 931 P. 2d 1046, cert. denied, 520 U. S. 1234 (1997), focused with sufficient directness and precision upon the distinction.

Consequently, I would remand this case so that Arizona's courts can determine whether Arizona law, as set forth in *Mott* and other cases, is consistent with the distinction the Court draws and whether the trial court so applied Arizona law here. I would also reserve the question (as I believe the Court has done) as to the burden of persuasion in a case where the defendant produces sufficient evidence of the second kind as to raise a reasonable doubt suggesting that he suffered from a mental illness so severe as to prevent him from forming any relevant intent at all.

For this reason, I dissent only from Parts III–B and III–C of the Court's opinion and the ultimate disposition of this case, and I join the remainder.

JUSTICE KENNEDY, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

In my submission the Court is incorrect in holding that Arizona may convict petitioner Eric Clark of first-degree murder for the intentional or knowing killing of a police officer when Clark was not permitted to introduce critical and reliable evidence showing he did not have that intent or knowledge. The Court is wrong, too, when it concludes the issue cannot be reached because of an error by Clark's counsel. Its reasons and conclusions lead me to file this respectful dissent.

Since I would reverse the judgment of the Arizona Court of Appeals on this ground, and the Arizona courts might well alter their interpretation of the State's criminal responsibility statute were my rationale to prevail, it is unnecessary for me to address the argument that Arizona's definition of insanity violates due process.

I

Clark claims that the trial court erred in refusing to consider evidence of his chronic paranoid schizophrenia in deciding whether he possessed the knowledge or intent required for first-degree murder. Seizing upon a theory invented here by the Court itself, the Court narrows Clark's claim so he cannot raise the point everyone else thought was involved in the case. The Court says the only issue before us is whether there is a right to introduce mental-disease evidence or capacity evidence, not a right to introduce observation evidence. See *ante*, at 756–765. This restructured evidentiary universe, with no convincing authority to support it, is unworkable on its own terms. Even were that not so, however, the Court's tripartite structure is something not addressed by the state trial court, the state appellate court, counsel on either side in those proceedings, or the briefs the parties filed with us. The Court refuses to consider the key part of Clark's claim because his counsel did

not predict the Court's own invention. It is unrealistic, and most unfair, to hold that Clark's counsel erred in failing to anticipate so novel an approach. If the Court is to insist on its approach, at a minimum the case should be remanded to determine whether Clark is bound by his counsel's purported waiver.

The Court's error, of course, has significance beyond this case. It adopts an evidentiary framework that, in my view, will be unworkable in many cases. The Court classifies Clark's behavior and expressed beliefs as observation evidence but insists that its description by experts must be mental-disease evidence or capacity evidence. See *ante*, at 757–759. These categories break down quickly when it is understood how the testimony would apply to the question of intent and knowledge at issue here. The most common type of schizophrenia, and the one Clark suffered from, is paranoid schizophrenia. See P. Berner et al., Diagnostic Criteria for Functional Psychoses 37 (2d ed. 1992). The existence of this functional psychosis is beyond dispute, but that does not mean the lay witness understands it or that a disputed issue of fact concerning its effect in a particular instance is not something for the expert to address. Common symptoms of the condition are delusions accompanied by hallucinations, often of the auditory type, which can cause disturbances of perception. *Ibid.* Clark's expert testified that people with schizophrenia often play radios loudly to drown out the voices in their heads. See App. 32. Clark's attorney argued to the trial court that this, rather than a desire to lure a policeman to the scene, explained Clark's behavior just before the killing. *Id.*, at 294–295. The observation that schizophrenics play radios loudly is a fact regarding behavior, but it is only a relevant fact if Clark has schizophrenia.

Even if this evidence were, to use the Court's term, mental-disease evidence, because it relies on an expert opinion, what would happen if the expert simply were to testify, without mentioning schizophrenia, that people with Clark's

symptoms often play the radio loudly? This seems to be factual evidence, as the term is defined by the Court, yet it differs from mental-disease evidence only in forcing the witness to pretend that no one has yet come up with a way to classify the set of symptoms being described. More generally, the opinion that Clark had paranoid schizophrenia—an opinion shared by experts for both the prosecution and defense—bears on efforts to determine, as a factual matter, whether he knew he was killing a police officer. The psychiatrist's explanation of Clark's condition was essential to understanding how he processes sensory data and therefore to deciding what information was in his mind at the time of the shooting. Simply put, knowledge relies on cognition, and cognition can be affected by schizophrenia. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 299 (4th ed. text rev. 2000) ("The characteristic symptoms of Schizophrenia involve a range of cognitive and emotional dysfunctions that include perception"); *ibid.* (Symptoms include delusions, which are "erroneous beliefs that usually involve a misinterpretation of perceptions or experiences"). The mental-disease evidence at trial was also intertwined with the observation evidence because it lent needed credibility. Clark's parents and friends testified Clark thought the people in his town were aliens trying to kill him. These claims might not be believable without a psychiatrist confirming the story based on his experience with people who have exhibited similar behaviors. It makes little sense to divorce the observation evidence from the explanation that makes it comprehensible.

Assuming the Court's tripartite structure were feasible, the Court is incorrect when it narrows Clark's claim to exclude any concern about observation evidence. In deciding Clark's counsel failed to raise this issue, the Court relies on a series of perceived ambiguities regarding how the claim fits within the Court's own categories. See *ante*, at 761–765. The Court cites no precedent for construing these ambiguities against the claimant and no prudential reason for ignor-

ing the breadth of Clark's claim. It is particularly surprising that the Court does so to the detriment of a criminal defendant asserting the fundamental challenge that the trier of fact refused to consider critical evidence showing he is innocent of the crime charged.

The alleged ambiguities are, in any event, illusory. The evidence at trial addressed more than the question of general incapacity or opinions regarding mental illness; it went further, as it included so-called observation evidence relevant to Clark's mental state at the moment he shot the officer. There was testimony, for example, that Clark thought the people in his town, particularly government officials, were not human beings but aliens who were trying to kill him. See App. 119–121, 131–132, 192–197, 249–256; Tr. of Bench Trial in No. CR 2000–538, pp. 110–112, 131–132, 136, 226–228 (Aug. 20, 2003); *id.*, at 24–25, 59–60 (Aug. 21, 2003). The Court recognizes the existence of this essential observation evidence. See *ante*, at 757–759.

The Court holds, nonetheless, that "we cannot be sure" whether the trial court failed to consider this evidence. *Ante*, at 764–765. It is true the trial court ruling was not perfectly clear. Its language does strongly suggest, though, that it did not consider any of this testimony in deciding whether Clark had the knowledge or intent required for first-degree murder. After recognizing that "much of the evidence that [the defense is] going to be submitting, in fact all of it, as far as I know . . . that has to do with the insanity could also arguably be made . . . as to form and intent and his capacity for the intent," the court concluded "we will be focusing, as far as I'm concerned, strictly on the insanity defense." App. 9. In announcing its verdict, the trial court did not mention any of the mental-illness evidence, observation or otherwise, in deciding Clark's guilt. *Id.*, at 331–335. The most reasonable assumption, then, would seem to be that the trial court did not consider it, and the Court does not hold otherwise. See *ante*, at 760–761.

Clark's objection to this refusal by the trier of fact to consider the evidence as it bore on his key defense was made at all stages of the proceeding. In his post-trial motion to vacate the judgment, Clark argued that "prohibiting consideration of *any* evidence reflecting upon a mentally ill criminal defendant's ability to form the necessary *mens rea* violates due process." Record, Doc. 406, p. 8. Clark pressed the same argument in the Arizona Court of Appeals. See Appellant's Opening Brief in No. 1CA–CR–03–0851 etc., pp. 46–52 (hereinafter Appellant's Opening Brief). He also noted that the trial judge had erred in refusing to consider nonexpert testimony—presumably what the Court would call observation evidence—on Clark's mental illness. *Id.*, at 47–48 ("The trial court therefore violated [Clark's] right to present a defense because [the] court refused to consider *any evidence*, including the multiple testimonials of *lay* witnesses . . . in deciding whether he could form the requisite *mens rea*"). The appeals court decided the issue on the merits, holding that the trial court was correct not to consider the evidence of mental illness in determining whether Clark had the *mens rea* for first-degree murder. See App. 351–353. It offered no distinction at all between observation or mental-disease evidence.

Notwithstanding the appeals court's decision, the Court states that the issue was not clearly presented to the state courts. See *ante*, at 762–765. According to the Court, Clark only raised an objection based on *State* v. *Mott*, 187 Ariz. 536, 931 P. 2d 1046 (1997), cert. denied, 520 U. S. 1234 (1997), see *ante*, at 762–765, and *Mott*'s holding was limited to the exclusion of mental-disease and capacity evidence, see *ante*, at 760. The Court is incorrect, and on both counts.

First, Clark's claim goes well beyond an objection to *Mott*. In fact, he specifically attempted to distinguish *Mott* by noting that the trial court in this case refused to consider all evidence of mental illness. See Record, Doc. 406, at 8; see

also Appellant's Opening Brief 48. The Court notices these arguments but criticizes Clark's counsel for not being specific about the observation evidence he wanted the trial court to consider. See *ante*, at 763. There was no reason, though, for Clark's counsel to believe additional specificity was required, since there was no evident distinction in Arizona law between observation evidence and mental-disease testimony.

Second, *Mott*'s holding was not restricted to mental-disease evidence. The Arizona Supreme Court did not refer to any distinction between observation and mental-disease evidence, or lay and expert testimony. Its holding was stated in broad terms: "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime." 187 Ariz., at 541, 931 P. 2d, at 1051; see *id.*, at 540, 931 P. 2d, at 1050 ("The legislature's decision . . . evidences its rejection of the use of psychological testimony to challenge the *mens rea* element of a crime"). The Court attempts to divine a fact/opinion distinction in *Mott* based on *Mott*'s distinguishing a case, *State* v. *Christensen*, 129 Ariz. 32, 628 P. 2d 580 (1981), where evidence about behavioral tendencies was deemed admissible. See *ante*, at 760. *Christensen*, though, also addressed an expert opinion; the difference was that the evidence there concerned a "character trait of acting reflexively in response to stress," not a mental illness. *Mott*, *supra*, at 544, 931 P. 2d, at 1054. Since the Court recognizes the Arizona Court of Appeals relied on *Mott*, the expansive rule of exclusion in *Mott*—without any suggestion of a limitation depending on the kind of evidence—should suffice for us to reach the so-called observation-evidence issue. Even if, as the Court contends, see *ante*, at 760, *Mott* is limited to expert testimony, the Court's categories still do not properly interpret *Mott*, because the Court's own definition of observation evidence includes some expert testimony, see *ante*, at 757–758.

It makes no difference that in the appeals court Clark referred to the issue as inability to form knowledge or intent.

See Appellant's Opening Brief 46–52. He did not insist on some vague, general incapacity. He stated, instead, that he "suffered from a major mental illness and was psychotic at the time of the offense." *Id.*, at 48. Even if Clark's arguments were insufficient to apprise the state court of the argument, "[o]ur traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 379 (1995) (quoting *Yee* v. *Escondido*, 503 U. S. 519, 534 (1992)). The claim is clear. Though it seems to be obscure to this Court, it was understood by the Arizona Court of Appeals, which stated: "Clark argues that the trial court erred in refusing to consider evidence of his mental disease or defect in determining whether he had the requisite *mens rea* to commit first-degree murder." App. 351. When the question is what the state court held, it is not instructive for this Court to recast the words the state court used.

The razor-thin distinction the Court draws between evidence being used to show incapacity and evidence being used to show lack of *mens rea* directly does not identify two different claims. Clark's single claim, however characterized, involves the use of the same mental-illness evidence to decide whether he had the requisite knowledge or intent. The various ways in which the evidence is relevant in disproving *mens rea* hardly qualify as separate claims. The new arguments allowed in *Lebron* and *Yee*, by comparison, were far more disconnected from the initial bases for the alleged violations. See *Lebron*, *supra*, at 378, 379 (for purposes of showing state action, petitioner could argue that Amtrak was a Government entity even though he argued below only that it was a private entity with close connections to Government entities, because the claim was simply "that Amtrak did not accord him the rights it was obliged to provide by the First Amendment"); *Yee*, *supra*, at 534, 535 (petitioners

could argue that an ordinance constituted a regulatory taking, even though they arguably asserted in the Court of Appeals only a physical taking, because the claim was simply "that the ordinance effects an unconstitutional taking"). If we give this latitude to litigants in civil cases, surely we must do so here. Furthermore, to the extent any ambiguity remains on whether the claim was raised, the proper course is to remand. See *Bradshaw* v. *Richey*, 546 U. S. 74, 80 (2005) *(per curiam)*. Unless the state court clearly decides an issue on state-law grounds, which the Court does not contend occurred here, there is no bar to our review of the federal question. See *Harris* v. *Reed*, 489 U. S. 255, 261–262 (1989).

Before this Court Clark framed the issue in broad terms that encompass the question whether the evidence of his mental illness should have been considered to show he did not at the time of the offense have the knowledge or intent to shoot a police officer. See Brief for Petitioner i ("Questions Presented for Review (1) Whether Arizona's blanket exclusion of evidence and refusal to consider mental disease or defect to rebut the state's evidence on the element of *mens rea* violated Petitioner's right to due process under the United States Constitution, Fourteenth Amendment?"), 22 ("Here, the trial court held that under the *Mott* rule it was obliged to find as a fact that [Clark] knew he was shooting a police officer to death—a necessary factual element of the only form of first degree murder charged against [Clark]—while simultaneously refusing to consider [Clark's] evidence that an acute episode of his chronic paranoid schizophrenic illness prevented him from actually having that knowledge" (emphasis deleted)), 31–32 (the Arizona courts erred in holding Clark "could be punished as though he had this knowledge and intent although he may not in fact have had either"); Reply Brief for Petitioner 3 (challenging the trial judge's refusal "to give any consideration to the mental-illness evidence in making his factual findings as to whether

[Clark] did or did not act with the state of mind required for a first-degree murder conviction"). An entire section of Clark's opening brief argues that the evidence of mental illness should have been considered to rebut the prosecution's inference of knowledge or intent from the factual circumstances of the crime. See Brief for Petitioner 13–21. This line of argument concerns facts of behavior and amounts to more than a claim of general incapacity.

Clark seeks resolution of issues that can be complex and somewhat overlapping. In the end, however, we must decide whether he had the right to introduce evidence showing he lacked the intent or knowledge the statute itself sets forth in describing a basic element of the crime. Clark has preserved this issue at all stages, including in this Court.

II

Clark was charged with first-degree murder for the shooting of Officer Jeffrey Moritz. "A person commits first-degree murder if," as relevant here, "[i]ntending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty." Ariz. Rev. Stat. Ann. § 13–1105(A)(3) (West Supp. 2005). Clark challenges the trial court's refusal to consider any evidence of mental illness, from lay or expert testimony, in determining whether he acted with the knowledge or intent element of the crime. See App. 9; see also *Mott*, 187 Ariz., at 541, 931 P. 2d, at 1051.

States have substantial latitude under the Constitution to define rules for the exclusion of evidence and to apply those rules to criminal defendants. See *United States* v. *Scheffer*, 523 U. S. 303, 308 (1998). This authority, however, has constitutional limits. "'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete de-

fense."'" *Holmes* v. *South Carolina*, 547 U. S. 319, 324 (2006) (quoting *Crane* v. *Kentucky*, 476 U. S. 683, 690 (1986), in turn quoting *California* v. *Trombetta*, 467 U. S. 479, 485 (1984)). "This right is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are '"arbitrary" or "disproportionate to the purposes they are designed to serve."'" *Holmes*, *supra*, at 324 (quoting *Scheffer*, *supra*, at 308, in turn citing and quoting *Rock* v. *Arkansas*, 483 U. S. 44, 58, 56 (1987)).

The central theory of Clark's defense was that his schizophrenia made him delusional. He lived in a universe where the delusions were so dominant, the theory was, that he had no intent to shoot a police officer or knowledge he was doing so. It is one thing to say he acted with intent or knowledge to pull the trigger. It is quite another to say he pulled the trigger to kill someone he knew to be a human being and a police officer. If the trier of fact were to find Clark's evidence sufficient to discount the case made by the State, which has the burden to prove knowledge or intent as an element of the offense, Clark would not be guilty of first-degree murder under Arizona law.

The Court attempts to diminish Clark's interest by treating mental-illness evidence as concerning only "judgment," rather than fact. *Ante*, at 776–777. This view appears to derive from the Court's characterization of Clark's claim as raising only general incapacity. See *ibid.* This is wrong for the reasons already discussed. It fails to recognize, moreover, the meaning of the offense element in question here. The *mens rea* element of intent or knowledge may, at some level, comprise certain moral choices, but it rests in the first instance on a factual determination. That is the fact Clark sought to put in issue. Either Clark knew he was killing a police officer or he did not.

The issue is not, as the Court insists, whether Clark's mental illness acts as an "excuse from customary criminal responsibility," *ante*, at 771, but whether his mental illness, as

a factual matter, made him unaware that he was shooting a police officer. If it did, Clark needs no excuse, as then he did not commit the crime as Arizona defines it. For the elements of first-degree murder, where the question is knowledge of particular facts—that one is killing a police officer—the determination depends not on moral responsibility but on empirical fact. Clark's evidence of mental illness had a direct and substantial bearing upon what he knew, or thought he knew, to be the facts when he pulled the trigger; this lay at the heart of the matter.

The trial court's exclusion was all the more severe because it barred from consideration on the issue of *mens rea* all this evidence, from any source, thus preventing Clark from showing he did not commit the crime as defined by Arizona law. Quite apart from due process principles, we have held that a bar of this sort can be inconsistent with the Confrontation Clause. See *Delaware* v. *Van Arsdall*, 475 U. S. 673 (1986). In *Van Arsdall* the Court held a state court erred in making a ruling that "prohibited *all* inquiry into" an event. *Id.*, at 679. At issue was a line of defense questioning designed to show the bias of a prosecution witness. In the instant case the ruling in question bars from consideration all testimony from all witnesses necessary to present the argument that was central to the whole case for the defense: a challenge to the State's own proof on an element of the crime. The Due Process and Compulsory Process Clauses, and not the Confrontation Clause, may be the controlling standard; but the disability imposed on the accused is every bit as substantial and pervasive here as it was in *Van Arsdall*.

Arizona's rule is problematic because it excludes evidence no matter how credible and material it may be in disproving an element of the offense. The Court's cases have noted the potential arbitrariness of *per se* exclusions and, on this rationale, have invalidated various state prohibitions. See *Holmes*, *supra*, at 329 (rule excluding, in certain cases, evidence that a third party may have committed the crime

"even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues"); *Rock*, *supra*, at 56 (rule excluding all hypnotically refreshed testimony "operates to the detriment of any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced"); *Washington* v. *Texas*, 388 U. S. 14, 22 (1967) (rule excluding accomplice testimony "prevent[s] whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief").

This is not to suggest all general rules on the exclusion of certain types of evidence are invalid. If the rule does not substantially burden the defense, then it is likely permissible. See *Scheffer*, 523 U. S., at 316–317 (upholding exclusion of polygraph evidence in part because this rule "does not implicate any significant interest of the accused"); *id.*, at 318 (KENNEDY, J., concurring in part and concurring in judgment) ("[S]ome later case might present a more compelling case for introduction of the testimony than this one does"). Where, however, the burden is substantial, the State must present a valid reason for its *per se* evidentiary rule.

In the instant case Arizona's proposed reasons are insufficient to support its categorical exclusion. While the State contends that testimony regarding mental illness may be too incredible or speculative for the jury to consider, this does not explain why the exclusion applies in all cases to all evidence of mental illness. "A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case." *Rock*, *supra*, at 61. States have certain discretion to bar unreliable or speculative testimony and to adopt rules to ensure the reliability of expert testimony. Arizona has done so, and there is no reason to believe its rules are insufficient to avoid

speculative evidence of mental illness. See Ariz. Rules Evid. 403, 702 (2006). This is particularly true because Arizona applies its usual case-by-case approach to permit admission of evidence of mental illness for a variety of other purposes. See, *e. g.*, *State* v. *Lindsey*, 149 Ariz. 472, 474–475, 720 P. 2d 73, 75–76 (1986) (en banc) (psychological characteristics of molestation victims); *State* v. *Hamilton*, 177 Ariz. 403, 408–410, 868 P. 2d 986, 991–993 (App. 1993) (psychological evidence of child abuse accommodation syndrome); *Horan* v. *Industrial Comm'n of Ariz.*, 167 Ariz. 322, 325–326, 806 P. 2d 911, 914–915 (App. 1991) (psychiatric testimony regarding neurological deficits).

The risk of jury confusion also fails to justify the rule. The State defends its rule as a means to avoid the complexities of determining how and to what degree a mental illness affects a person's mental state. The difficulty of resolving a factual issue, though, does not present a sufficient reason to take evidence away from the jury even when it is crucial for the defense. "We have always trusted juries to sort through complex facts in various areas of law." *United States* v. *Booker*, 543 U. S. 220, 289 (2005) (STEVENS, J., dissenting in part). Even were the risk of jury confusion real enough to justify excluding evidence in most cases, this would provide little basis for prohibiting all evidence of mental illness without any inquiry into its likely effect on the jury or its role in deciding the linchpin issue of knowledge and intent. Indeed, Arizona has a rule in place to serve this very purpose. See Rule 403.

Even assuming the reliability and jury-confusion justifications were persuasive in some cases, they would not suffice here. It does not overcome the constitutional objection to say that an evidentiary rule that is reasonable on its face can be applied as well to bar significant defense evidence without any rational basis for doing so. In *Van Arsdall*, for example, the Court rejected the application of Delaware Rule of Evidence 403, which allows relevant evidence to be excluded

where its probative value is substantially outweighed by the risk of unfair prejudice or other harms to the trial process. 475 U. S., at 676, and n. 2. While the Rule is well established and designed for a legitimate function, the Constitution prevented an application that deprived the defendant of all inquiry into an important issue. *Id.*, at 679. Other cases have applied this same case-specific analysis in deciding the legitimacy of an exclusion. See, *e. g.*, *Rock*, 483 U. S., at 62 (the "circumstances present an argument for admissibility of petitioner's testimony in this particular case, an argument that must be considered by the trial court"); *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973) ("In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice"); cf. *Scheffer*, *supra*, at 318 (KENNEDY, J., concurring in part and concurring in judgment).

The Court undertakes little analysis of the interests particular to this case. By proceeding in this way it devalues Clark's constitutional rights. The reliability rationale has minimal applicability here. The Court is correct that many mental diseases are difficult to define and the subject of great debate. See *ante*, at 774–775. Schizophrenia, however, is a well-documented mental illness, and no one seriously disputes either its definition or its most prominent clinical manifestations. The State's own expert conceded that Clark had paranoid schizophrenia and was actively psychotic at the time of the killing. See App. 254–257. The jury-confusion rationale, if it is at all applicable here, is the result of the Court's own insistence on conflating the insanity defense and the question of intent. Considered on its own terms, the issue of intent and knowledge is a straightforward factual question. A trier of fact is quite capable of weighing defense testimony and then determining whether the accused did or did not intend to kill or knowingly kill a human being who was a police officer. True, the issue can be diffi-

cult to decide in particular instances, but no more so than many matters juries must confront.

The Court says mental-illness evidence "can easily mislead," *ante*, at 776, and may "tel[l] us little or nothing about the ability of the defendant to form *mens rea*," *ante*, at 775. These generalities do not, however, show how relevant or misleading the evidence in this case would be (or explain why Arizona Rule of Evidence 403 is insufficient for weighing these factors). As explained above, the evidence of Clark's mental illness bears directly on *mens rea*, for it suggests Clark may not have known he was killing a human being. It is striking that while the Court discusses at length the likelihood of misjudgment from placing too much emphasis on evidence of mental illness, see *ante*, at 773–778, it ignores the risk of misjudging an innocent man guilty from refusing to consider this highly relevant evidence at all. Clark's expert, it is true, said no one could know exactly what was on Clark's mind at the time of the shooting. See *ante*, at 777. The expert testified extensively, however, about the effect of Clark's delusions on his perceptions of the world around him, and about whether Clark's behavior around the time of the shooting was consistent with delusional thinking. This testimony was relevant to determining whether Clark knew he was killing a human being. It also bolstered the testimony of lay witnesses, none of which was deemed unreliable or misleading by the state courts.

For the same reasons, the Court errs in seeking support from the American Psychiatric Association's statement that a psychiatrist may be justifiably reluctant to reach legal conclusions regarding the defendant's mental state. See *ante*, at 777–778. In this very case, the American Psychiatric Association made clear that psychiatric evidence plays a crucial role regardless of whether the psychiatrist testifies on the ultimate issue: "Expert evidence of mental disorders, presented by qualified professionals and subject to adversarial testing, is both relevant to the mental-state issues raised by

mens rea requirements and reliable. . . . Such evidence could not be condemned wholesale without unsettling the legal system's central reliance on such evidence." Brief for American Psychiatric Association et al. as *Amici Curiae* 15.

Contrary to the Court's suggestion, see *ante*, at 776, the fact that the state and defense experts drew different conclusions about the effect of Clark's mental illness on his mental state only made Clark's evidence contested; it did not make the evidence irrelevant or misleading. The trial court was capable of evaluating the competing conclusions, as factfinders do in countless cases where there is a dispute among witnesses. In fact, the potential to mislead will be far greater under the Court's new evidentiary system, where jurors will receive observation evidence without the necessary explanation from experts.

The fact that mental-illness evidence may be considered in deciding criminal responsibility does not compensate for its exclusion from consideration on the *mens rea* elements of the crime. Cf. *ante*, at 773–774. The evidence addresses different issues in the two instances. Criminal responsibility involves an inquiry into whether the defendant knew right from wrong, not whether he had the *mens rea* elements of the offense. While there may be overlap between the two issues, "the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." *Mullaney* v. *Wilbur*, 421 U. S. 684, 706 (1975) (Rehnquist, J., concurring).

Even if the analyses were equivalent, there is a different burden of proof for insanity than there is for *mens rea*. Arizona requires the defendant to prove his insanity by clear and convincing evidence. See Ariz. Rev. Stat. Ann. § 13–502(C) (West 2001). The prosecution, however, must prove all elements of the offense beyond a reasonable doubt. See *Mullaney*, *supra*, at 703–704; *In re Winship*, 397 U. S. 358, 364 (1970). The shift in the burden on the criminal responsibility issue, while permissible under our precedent, see *Le-*

land v. *Oregon*, 343 U. S. 790 (1952), cannot be applied to the question of intent or knowledge without relieving the State of its responsibility to establish this element of the offense. See *Sandstrom* v. *Montana*, 442 U. S. 510, 524 (1979) (jury instruction that had the effect of placing the burden on the defendant to disprove that he had the requisite mental state violates due process). While evidentiary rules do not generally shift the burden impermissibly, where there is a right to have evidence considered on an element of the offense, the right is not respected by allowing the evidence to come in only on an issue for which the defendant bears the burden of proof. See *Cool* v. *United States*, 409 U. S. 100, 103 (1972) *(per curiam)* (jury instruction that allowed jury to consider accomplice's testimony only if it was true beyond a reasonable doubt "places an improper burden on the defense and allows the jury to convict despite its failure to find guilt beyond a reasonable doubt"); *Martin* v. *Ohio*, 480 U. S. 228, 233–234 (1987) (State can shift the burden on a claim of self-defense, but if the jury were disallowed from considering self-defense evidence for purposes of deciding the elements of the offense, it "would relieve the State of its burden and plainly run afoul of *Winship*'s mandate"). By viewing the Arizona rule as creating merely a "presumption of sanity (or capacity or responsibility)," *ante*, at 771, rather than a presumption that the *mens rea* elements were not affected by mental illness, the Court fails to appreciate the implications for *Winship*.

The State attempts to sidestep the evidentiary issue entirely by claiming that its mental-illness exclusion simply alters one element of the crime. The evidentiary rule at issue here, however, cannot be considered a valid redefinition of the offense. Under the State's logic, a person would be guilty of first-degree murder if he knowingly or intentionally killed a police officer or committed the killing under circumstances that would show knowledge or intent but for the defendant's mental illness. To begin with, Arizona law does

not say this. And if it did, it would be impermissible. States have substantial discretion in defining criminal offenses. In some instances they may provide that the accused has the burden of persuasion with respect to affirmative defenses. See *Patterson* v. *New York*, 432 U. S. 197, 210 (1977). "But there are obviously constitutional limits beyond which the States may not go in this regard." *Ibid.* If it were otherwise, States could label all evidentiary exclusions as redefinitions and so evade constitutional requirements. There is no rational basis, furthermore, for criminally punishing a person who commits a killing without knowledge or intent only if that person has a mental illness. Cf. *Robinson* v. *California*, 370 U. S. 660, 666 (1962). The State attempts to bring the instant case within the ambit of *Montana* v. *Egelhoff*, 518 U. S. 37 (1996); but in *Egelhoff* the excluded evidence concerned voluntary intoxication, for which a person can be held responsible. Viewed either as an evidentiary rule or a redefinition of the offense, it was upheld because it "comports with and implements society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences." *Id.*, at 50 (plurality opinion). An involuntary mental illness does not implicate this justification.

Future dangerousness is not, as the Court appears to conclude, see *ante*, at 778–779, n. 45, a rational basis for convicting mentally ill individuals of crimes they did not commit. Civil commitment proceedings can ensure that individuals who present a danger to themselves or others receive proper treatment without unfairly treating them as criminals. The State presents no evidence to the contrary, and the Court ought not to imply otherwise.

The State gains little support from *Fisher* v. *United States*, 328 U. S. 463 (1946). There the defendant requested an instruction from the trial court that the jury consider his mental deficiencies in determining his capacity for premeditation and deliberation. *Id.*, at 470. The Court noted that

"[i]n view of the status of the defense of partial responsibility in the District and the nation no contention is or could be made of the denial of due process." *Id.*, at 466. This dictum may be attributable to the fact that the cases recognizing a defendant's evidentiary rights and the prosecution's duty to prove all elements beyond a reasonable doubt were still decades away. It may also reflect the fact that the jury instructions as given did seem to allow the jury to consider evidence of mental deficiency if it disproved the elements of the offense. See *id.*, at 467, n. 3 (The jury instructions stated, "'It is further contended that even if sane and responsible, there was no deliberate intent to kill, nor in fact any actual intent to kill. Therefore if not guilty by reason of insanity, the defendant at most is guilty only of second degree murder or manslaughter'"). Even further ambiguity comes from the fact that the defense in *Fisher* concerned a claim that the petitioner was "mentally somewhat below the average" with a "psychopathic personality" of aggression. *Id.*, at 467. This general claim of mental deficiencies was relevant to the "theory of partial responsibility," *id.*, at 470, he wanted the jury to consider. Unlike the mental illness here, though, which concerns inadequacy of perception and information processing, the petitioner's claim may not have been relevant to *mens rea* unless *mens rea* were redefined to include an element of responsibility. *Fisher*'s language, then, does not control this case.

While Arizona's rule is not unique, either historically or in contemporary practice, this fact does not dispose of Clark's constitutional argument. To the extent *Fisher* may have suggested the contrary, subsequent cases make clear that while the existence of the rule in some jurisdictions is a significant factor to consider, see *Egelhoff*, *supra*, at 43 (plurality opinion), it is not dispositive for evaluation of a claim that the accused was foreclosed from introducing evidence crucial to the defense. The evidentiary exclusion of accomplice testimony the Court invalidated in *Washington* was, in fact,

well established. See 388 U. S., at 21–22. The exclusion of hypnotically refreshed testimony likewise had some support when the Court held it unconstitutional as applied to a defendant's own testimony. *Rock*, 483 U. S., at 57. While 13 States still impose significant restrictions on the use of mental-illness evidence to negate *mens rea*, a substantial majority of the States currently allow it. Brief for United States as *Amicus Curiae* 22–23, and n. 13. The fact that a reasonable number of States restrict this evidence weighs into the analysis, but applying the rule as a *per se* bar, as Arizona does, is so plainly unreasonable that it cannot be sustained.

Putting aside the lack of any legitimate state interest for application of the rule in this case, its irrationality is apparent when considering the evidence that is allowed. See *Washington*, *supra*, at 22 ("The absurdity of the rule is amply demonstrated by the exceptions that have been made to it"). Arizona permits the defendant to introduce, for example, evidence of "behavioral tendencies" to show he did not have the required mental state. See *Mott*, 187 Ariz., at 544, 931 P. 2d, at 1054; *Christensen*, 129 Ariz., at 35–36, 628 P. 2d, at 583–584. While defining mental illness is a difficult matter, the State seems to exclude the evidence one would think most reliable by allowing unexplained and uncategorized tendencies to be introduced while excluding relatively well-understood psychiatric testimony regarding well-documented mental illnesses. It is unclear, moreover, what would have happened in this case had the defendant wanted to testify that he thought Officer Moritz was an alien. If disallowed, it would be tantamount to barring Clark from testifying on his behalf to explain his own actions. If allowed, then Arizona's rule would simply prohibit the corroboration necessary to make sense of Clark's explanation. In sum, the rule forces the jury to decide guilt in a fictional world with undefined and unexplained behaviors but without mental illness. This rule has no rational justification and

imposes a significant burden upon a straightforward defense: He did not commit the crime with which he was charged.

These are the reasons for my respectful dissent.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 801 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 26 THROUGH SEPTEMBER 28, 2006

JUNE 26, 2006

Certiorari Granted—Vacated and Remanded

No. 04–1657. CRUZ, AS REPRESENTATIVE OF CRUZ *v.* BLUE CROSS AND BLUE SHIELD OF ILLINOIS ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 547 U. S. 677 (2006). Reported below: 396 F. 3d 793.

No. 05–623. GERKE EXCAVATING, INC. *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rapanos* v. *United States*, 547 U. S. 715 (2006). Reported below: 412 F. 3d 804.

No. 05–776. DISHER *v.* CITIGROUP GLOBAL MARKETS INC. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kircher* v. *Putnam Funds Trust*, 547 U. S. 633 (2006). THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 419 F. 3d 649.

No. 05–1092. MOUELLE ET UX. *v.* GONZALES, ATTORNEY GENERAL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of 71 Fed. Reg. 27585 (2006). Reported below: 416 F. 3d 923.

No. 05–9171. CASTELLANOS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Davis* v. *Washington*, 547 U. S. 813 (2006).

Miscellaneous Orders

No. 05A1067. JONES *v.* BAKER & HOSTETLER, LLP, ET AL. Ct. Common Pleas, Cuyahoga County, Ohio. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. 05M90. PERKINS *v.* CITY OF CHICAGO, ILLINIOS, ET AL.; and

No. 05M91. MCFARLAND *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 05–1076. PADOT *v.* PADOT. Dist. Ct. App. Fla., 2d Dist.; and

No. 05–10787. MURPHY *v.* OKLAHOMA. Ct. Crim. App. Okla. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 05–9739. WILLIAMS *v.* DEPARTMENT OF LABOR ET AL. C. A. 4th Cir.; and

No. 05–10494. DELUCA *v.* KATCHMERIC. Sup. Ct. Va. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 17, 2006, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 05–11263. IN RE ALLAH; and

No. 05–11293. IN RE WHITE. Petitions for writs of habeas corpus denied.

No. 05–10497. IN RE RUIZ; and

No. 05–10501. IN RE LETIZIA. Petitions for writs of mandamus denied.

No. 05–1418. IN RE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF MULTIJURISDICTIONAL PRACTICE ET AL.;

No. 05–10533. IN RE BUCK;

No. 05–10573. IN RE SHERRELL; and

No. 05–10581. IN RE MILES. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 04–1350. KSR INTERNATIONAL CO. *v.* TELEFLEX INC. ET AL. C. A. Fed. Cir. Motions of Progress & Freedom Foundation, Twenty-Four Intellectual Property Law Professors, and Cisco Systems Inc. et al. for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 119 Fed. Appx. 282.

No. 05–381. WEYERHAEUSER CO. *v.* ROSS-SIMMONS HARDWOOD LUMBER CO., INC. C. A. 9th Cir. Certiorari granted. Reported below: 411 F. 3d 1030.

No. 05–1074. LEDBETTER *v.* GOODYEAR TIRE & RUBBER CO., INC. C. A. 11th Cir. Certiorari granted. Reported below: 421 F. 3d 1169.

No. 05–1120. MASSACHUSETTS ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 415 F. 3d 50.

No. 05–1126. BELL ATLANTIC CORP. ET AL. *v.* TWOMBLY ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 425 F. 3d 99.

Certiorari Denied

No. 04–8888. PAYAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 05–646. DAVALOS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 05–952. MAGLUTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 418 F. 3d 1166.

No. 05–1058. VA LERIE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 424 F. 3d 694.

No. 05–1090. SYNERGY STAFFING, INC., FKA PERSONNEL CONNECTION, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 134 Fed. Appx. 158.

No. 05–1095. INDIANA WATER QUALITY COALITION *v.* ENVIRONMENTAL PROTECTION AGENCY. C. A. 6th Cir. Certiorari denied. Reported below: 411 F. 3d 726.

No. 05–1116. FLURY *v.* DAIMLERCHRYSLER CORP. C. A. 11th Cir. Certiorari denied. Reported below: 427 F. 3d 939.

No. 05–1177. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* OREGON DEPARTMENT OF TRANSPORTATION ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 339 Ore. 554, 124 P. 3d 1210.

No. 05–1209. ASHLEY CREEK PHOSPHATE CO. *v.* SCARLETT, ACTING SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 420 F. 3d 934.

No. 05–1221. MARTIN ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 422 F. 3d 1319.

No. 05–1222. KEELER ET AL. *v.* STALDER, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 407 F. 3d 351.

No. 05–1223. SINGH *v.* U. S. SECURITY ASSOCIATES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 152 Fed. Appx. 36.

No. 05–1225. MEMBERS OF THE PEANUT QUOTA HOLDERS ASSN., INC., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 421 F. 3d 1323.

No. 05–1230. FINANCE ONE PUBLIC CO. LTD. *v.* LEHMAN BROTHERS SPECIAL FINANCING, INC. C. A. 2d Cir. Certiorari denied. Reported below: 414 F. 3d 325.

No. 05–1232. INSTA-MIX, INC., ET AL. *v.* LUV N' CARE, LTD. C. A. 5th Cir. Certiorari denied. Reported below: 438 F. 3d 465.

No. 05–1236. SKF USA INC. *v.* INTERNATIONAL TRADE COMMISSION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 423 F. 3d 1307.

No. 05–1239. TVT RECORDS ET AL. *v.* ISLAND DEF JAM MUSIC GROUP ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 412 F. 3d 82.

No. 05–1243. MEDEIROS *v.* SULLIVAN, DIRECTOR, RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 431 F. 3d 25.

No. 05–1298. ROMERO ET UX., NEXT FRIENDS OF ROMERO, A MINOR CHILD *v.* WYETH, FKA LEDERLE LABORATORIES. C. A. 5th Cir. Certiorari denied. Reported below: 145 Fed. Appx. 962.

No. 05–1329. KORESKO ET AL. *v.* BURSEY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 430 F. 3d 424.

No. 05–1331. SCHULZ *v.* WASHINGTON COUNTY BOARD OF SUPERVISORS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 145 Fed. Appx. 704.

No. 05–1332. MILNE, BY AND THROUGH COYNE, HER RECEIVER *v.* STEPHEN SLESINGER, INC. C. A. 9th Cir. Certiorari denied. Reported below: 430 F. 3d 1036.

No. 05–1333. McCULLOUGH ET VIR *v.* HALL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 538.

No. 05–1334. CARNAHAN *v.* TEXAS. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 05–1336. KNIERIEM, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SIADE, DECEASED *v.* GROUP HEALTH PLAN, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 434 F. 3d 1058.

No. 05–1337. GARNER *v.* GONZALES, DIRECTOR, CHILD SUPPORT ENFORCEMENT DIVISION, NEW MEXICO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 167 Fed. Appx. 21.

No. 05–1339. HAAN *v.* COX, ATTORNEY GENERAL OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 05–1344. DURAND ET UX. *v.* UNITED STATES CUSTOMS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 542.

No. 05–1346. LOUISIANA-PACIFIC CORP. *v.* LESTER BUILDING SYSTEMS, A DIVISION OF BUTLER MANUFACTURING CO., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 3d 831.

No. 05–1347. COLEMAN *v.* NEW ORLEANS & BATON ROUGE STEAMSHIP PILOTS' ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 437 F. 3d 471.

No. 05–1348. SCHMIDT *v.* BUCHANAN. Ct. App. Iowa. Certiorari denied. Reported below: 710 N. W. 2d 546.

No. 05–1349. BANNA ET UX. *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 05–1352. SMITH *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 6 N. Y. 3d 827, 850 N. E. 2d 622.

No. 05–1353. BENSON ET UX. *v.* SOUTH DAKOTA ET AL. Sup. Ct. S. D. Certiorari denied. Reported below: 710 N. W. 2d 131.

No. 05–1356. PEREZ ET AL. *v.* UNIFIED GOVERNMENT OF WYANDOTTE COUNTY/KANSAS CITY, KANSAS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 432 F. 3d 1163.

No. 05–1357. SEAMAN *v.* GARAMENDI, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 05–1374. OKLAHOMA *v.* GOLDEN; OKLAHOMA *v.* HOGAN; and OKLAHOMA *v.* GIBBS. Ct. Crim. App. Okla. Certiorari denied. Reported below: 127 P. 3d 1150 (first judgment).

No. 05–1375. HILL, ADMINISTRATOR OF THE ESTATE OF BARBER, ET AL. *v.* DIXON ET UX. Ct. App. N. C. Certiorari denied. Reported below: 174 N. C. App. 252, 620 S. E. 2d 715.

No. 05–1380. WILLIAMS *v.* JACKSON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 908.

No. 05–1389. AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE ET AL. *v.* BREDESEN, GOVERNOR OF TENNESSEE, ET AL.; and No. 05–1483. NEW LIFE RESOURCES, INC. *v.* AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 441 F. 3d 370.

No. 05–1392. MANGRA *v.* GONZALES, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 615.

No. 05–1396. YOUNG *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 710 N. W. 2d 258.

No. 05–1397. CARNERO *v.* BOSTON SCIENTIFIC CORP. C. A. 1st Cir. Certiorari denied. Reported below: 433 F. 3d 1.

No. 05–1402. FOLLUM *v.* FOLLUM, AKA VIOLANTE. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 20 App. Div. 3d 886, 797 N. Y. S. 2d 331.

No. 05–1407. HIGUIT *v.* GONZALES, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 433 F. 3d 417.

No. 05–1409. KOSOY ET AL. *v.* GTE MOBILNET OF HOUSTON, INC., ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 184 S. W. 3d 707.

No. 05–1412. MOSSA *v.* GONZALES, ATTORNEY GENERAL. C. A. 8th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 554.

No. 05–1420. PINO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 916.

No. 05–1438. VALLECILLO *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. C. A. 5th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 764.

No. 05–1440. HENDERSON *v.* OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 143 Fed. Appx. 741.

No. 05–1451. LOUBSER *v.* THACKER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 440 F. 3d 439.

No. 05–1457. BOWEN *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 05–1463. CROCKETT, INDIVIDUALLY AND AS HEIR TO THE ESTATE OF CROCKETT, ET AL. *v.* R. J. REYNOLDS TOBACCO CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 436 F. 3d 529.

No. 05–1471. HARRIS COUNTY TOLL ROAD AUTHORITY ET AL. *v.* CENTERPOINT ENERGY HOUSTON ELECTRIC LLC ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 436 F. 3d 541.

No. 05–1475. EARLS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 157 Fed. Appx. 421.

No. 05–1479. CLARKE *v.* NICHOLSON, SECRETARY OF VETERANS AFFAIRS. C. A. 3d Cir. Certiorari denied. Reported below: 153 Fed. Appx. 69.

No. 05–1484. LAMERE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 05–1487. O'CONNOR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 513.

No. 05–1495. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 946.

No. 05–1497. BOLANOS-MUNOZ ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 545.

No. 05–1503. YORK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 428 F. 3d 1325.

No. 05–1504. EDWARDS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 442 F. 3d 258.

No. 05–1510. MIEDZIANOWSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 168 Fed. Appx. 743.

No. 05–1511. BATIE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 433 F. 3d 1287.

No. 05–7667. HEDRICK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 871.

No. 05–8392. VASQUEZ *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 356 Ill. App. 3d 420, 824 N. E. 2d 1071.

No. 05–8925. MARINO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 21 App. Div. 3d 430, 800 N. Y. S. 2d 39.

No. 05–9386. DIAS MOREIRA *v.* GONZALES, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 05–9561. HILL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 430 F. 3d 939.

No. 05–9636. MORTIER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 937.

No. 05–9728. GRIFFIN *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 05–9801. RANSOM *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 919 So. 2d 887.

No. 05–9829. PAYNE *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 418 F. 3d 644.

No. 05–9842. ROGERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 165 Fed. Appx. 873.

No. 05–9866. GLASS *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied.

No. 05–9982. NALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 146 Fed. Appx. 462.

No. 05–10005. BOWLING *v.* LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT ET AL. Sup. Ct. Ky. Certiorari denied. Reported below: 172 S. W. 3d 333.

No. 05–10062. BRIDGERS *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 431 F. 3d 853.

No. 05–10233. FRY *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 138 N. M. 700, 126 P. 3d 516.

No. 05–10465. SIGMON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 366 S. C. 552, 623 S. E. 2d 648.

No. 05–10469. JIMENEZ *v.* RYAN, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–10472. WILLIAMS *v.* IBERIA PARISH SHERIFF'S DEPARTMENT ET AL.; and WILLIAMS *v.* PFIZER INC. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 242 (second judgment) and 277 (first judgment).

No. 05–10476. OWUSU *v.* MICHIGAN. Cir. Ct. Genesee County, Mich. Certiorari denied.

No. 05–10480. DYE *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 144 Fed. Appx. 995.

No. 05–10484. SEMPLE *v.* WALKER, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 05–10486. SCANLON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 05–10496. CARTER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 05–10498. STEPHENS *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 05–10506. BROWDER *v.* CHIEF DEPUTY JAILER OF LEE COUNTY, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 160 Fed. Appx. 534.

No. 05–10514. SAVCHICK *v.* JOHNSEN ET AL. Ct. App. Ariz. Certiorari denied.

No. 05–10516. CARNEY *v.* LUOMA, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 05–10517. SANCHEZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 05–10518. CONYERS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 05–10521. NELSON *v.* WONG ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 719.

No. 05–10527. TATUM *v.* LASALLE BANK, NA, TRUSTEE, ET AL. App. Ct. Conn. Certiorari denied.

No. 05–10528. ALLEN *v.* HARRISON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 618.

No. 05–10530. SMILEY *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 05–10531. MICHAU *v.* CHARLESTON COUNTY, SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 434 F. 3d 725.

No. 05–10534. WAKEFIELD *v.* CITY OF MIAMI-DADE, FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 05–10535. FREEMAN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 926 So. 2d 1080.

No. 05–10538. METZSCH *v.* AVAYA, INC. C. A. 8th Cir. Certiorari denied. Reported below: 159 Fed. Appx. 736.

No. 05–10540. PRUITT *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 834 N. E. 2d 90.

No. 05–10542. MEEK *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 05–10548. ESTACIO *v.* OREGON DEPARTMENT OF CORRECTIONS ET AL. C. A. 9th Cir. Certiorari denied.

No. 05–10558. LOPEZ *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–10567. BENNETT *v.* JONES, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 05–10571. MIXON *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–10572. SHERBURNE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 05–10574. PORTALES *v.* MADIGAN, ATTORNEY GENERAL OF ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 05–10575. RAMIREZ *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 05–10579. FLEETWOOD *v.* GRANHOLM, GOVERNOR OF MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 05–10580. NEVINS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 16 App. Div. 3d 1046, 791 N. Y. S. 2d 771.

No. 05–10582. STANFORD *v.* SMITH, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 05–10583. WILLIAMS *v.* PORTACCI ET AL. C. A. 5th Cir. Certiorari denied.

No. 05–10584. TWYMAN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 954 So. 2d 1145.

No. 05–10590. MURPHY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 37 Cal. 4th 490, 123 P. 3d 155.

No. 05–10592. BURKETT *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied. Reported below: 172 S. W. 3d 250.

No. 05–10598. DOMINO *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 05–10599. CADY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 05–10602. CLELLAND *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 34 Kan. App. 2d xxi, 116 P. 3d 55.

No. 05–10606. DUQUE *v.* OHIO. Ct. App. Ohio, Seneca County. Certiorari denied.

No. 05–10610. WILLIAMS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 05–10616. JACKSON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 107 Ohio St. 3d 53, 836 N. E. 2d 1173.

No. 05–10654. HUERTA *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–10659. WELLS *v.* MINZEY, SHERIFF, WASHTENAW COUNTY, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 05–10666. MCKNIGHT *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 107 Ohio St. 3d 101, 837 N. E. 2d 315.

No. 05–10728. WILLIAMS *v.* CRIST, ATTORNEY GENERAL OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 05–10752. CANNON *v.* BAZZLE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 364.

No. 05–10753. SAMUEL *v.* CONWAY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 05–10786. HALL *v.* HOUSTON ET AL. Sup. Ct. Neb. Certiorari denied.

No. 05–10792. BROWNING *v.* BI-LO, INC. Ct. App. S. C. Certiorari denied.

No. 05–10804. ROSS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 280 Kan. 878, 127 P. 3d 249.

No. 05–10808. MITCHELL *v.* HALL ET AL. C. A. 1st Cir. Certiorari denied.

No. 05–10809. MCDONALD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 05–10819. WILLIAMS *v.* BAZZLE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 161.

No. 05–10829. MARTIN *v.* KANSAS. Sup. Ct. Kan. Certiorari denied.

No. 05–10851. WILLIAMS *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 177 Fed. Appx. 231.

No. 05–10867. CHEN *v.* BRANCH BANKING & TRUST CO. Cir. Ct. Prince George's County, Md. Certiorari denied.

No. 05–10877. ROLLING *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 438 F. 3d 1296.

No. 05–10903. GLASS *v.* YOUNG, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 153.

No. 05–11059. ALLEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 169 Fed. Appx. 634.

No. 05–11072. PORTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 153 Fed. Appx. 912.

No. 05–11073. NUNEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 05–11076. GALLARZA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 161 Fed. Appx. 267.

No. 05–11078. PATTERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–11088. WENGER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 427 F. 3d 840.

No. 05–11090. GRIFFIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 05–11091. GROSS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 437 F. 3d 691.

No. 05–11095. CHAVEZ GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 166 Fed. Appx. 981.

No. 05–11096. CHONG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 05–11101. LUCERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 164 Fed. Appx. 594.

No. 05–11102. COFFMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–11106. MCCARTHY *v.* GALLEGOS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 168 Fed. Appx. 276.

No. 05–11110. SCOTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 791.

No. 05–11111. RUBIO-LADEZMA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–11112. CARMONA ROZUK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 172 Fed. Appx. 736.

No. 05–11115. ROMERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 826.

No. 05–11116. SALGADO-BRITO *v.* UNITED STATES (Reported below: 169 Fed. Appx. 206); RODRIGUEZ-RESENDIZ *v.* UNITED STATES (169 Fed. Appx. 192); LINO-MEJIA *v.* UNITED STATES (169 Fed. Appx. 268); MARTINEZ-FIGUEROA *v.* UNITED STATES (169 Fed. Appx. 211); ORNELAS-RODRIGUEZ *v.* UNITED STATES (169 Fed. Appx. 262); HERNANDEZ-BELTRAN *v.* UNITED STATES (169 Fed. Appx. 195); VACA-ANDRADE *v.* UNITED STATES (169 Fed. Appx. 355); HERRERA-PEREZ *v.* UNITED STATES (169 Fed. Appx. 293); VERA-BEDOLLA *v.* UNITED STATES (169 Fed. Appx. 300); TAVERA-TERAN *v.* UNITED STATES (168 Fed. Appx. 667); BERNAL-VENCES *v.* UNITED STATES (169 Fed. Appx. 292); CRUZ-RANGEL *v.* UNITED STATES (169 Fed. Appx. 301); MOTA *v.* UNITED STATES (169 Fed. Appx. 314); ORTIZ-AROZENA *v.* UNITED STATES (169 Fed. Appx. 358); CANTU-RODRIGUEZ *v.* UNITED STATES (176 Fed. Appx. 439); SOLORZANO-CRUZ *v.* UNITED STATES (176 Fed. Appx. 482); RENDON-GARCIA *v.* UNITED STATES (176 Fed. Appx. 497); CHAVEZ-PEREZ *v.* UNITED STATES (176 Fed. Appx. 528); ZAQUERO-SANCHEZ *v.* UNITED STATES (176 Fed. Appx. 531); HERRERA-RESENDEZ *v.* UNITED STATES (176 Fed. Appx. 526); and QUIROZ-ESCANDON *v.* UNITED STATES (176 Fed. Appx. 523). C. A. 5th Cir. Certiorari denied.

No. 05–11117. LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–11118. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 05–11120. BROWN *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 157 Fed. Appx. 295.

No. 05–11121. DARE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 425 F. 3d 634.

No. 05–11125. POWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 155 Fed. Appx. 725.

No. 05–11126. PECK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–11127. PICKETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 174 Fed. Appx. 731.

No. 05–11130. BLALOCK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–11138. SCHEER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 168 Fed. Appx. 628.

No. 05–11143. BAXTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 152 Fed. Appx. 878.

No. 05–11153. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 444 F. 3d 430.

No. 05–11156. BADRUDDOZZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 05–11158. CASTORENA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 181.

No. 05–11162. WAGAR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 05–11164. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–11167. AMAYA-MEMBRENO *v.* UNITED STATES; ANGEL-LEONARDO *v.* UNITED STATES; BETANCOURT-OCHOA *v.* UNITED STATES; ECHAVARRIA-RIVERA *v.* UNITED STATES; GONZALEZ-ROJAS *v.* UNITED STATES; GONZALEZ-VARGAS *v.* UNITED STATES;

LUNA-PEREZ *v.* UNITED STATES; and MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 168 Fed. Appx. 612 (eighth judgment) and 613 (second judgment); 169 Fed. Appx. 216 (fifth judgment), 280 (third judgment), 294 (fourth judgment), 297 (first judgment), and 839 (sixth judgment).

No. 05–11169. BATTEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–11171. TAIWO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 168 Fed. Appx. 596.

No. 05–11172. DICLEMENTE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 154 Fed. Appx. 409.

No. 05–11178. SEGURA-LARA *v.* UNITED STATES; and DE LA GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 168 Fed. Appx. 647 (second judgment).

No. 05–11181. REYES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 05–11183. STEWART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 168 Fed. Appx. 622.

No. 05–11187. RIOJAS-VICTORIO *v.* UNITED STATES; RAMOS-MORA *v.* UNITED STATES; GUTIERREZ-SALAZAR, AKA GUTIERREZ, AKA SALAZAR, AKA GUTIERREZ SALAZAR *v.* UNITED STATES; FLORES-AMPARAN *v.* UNITED STATES; and ALCAYAGA-MALDONADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 168 Fed. Appx. 662 (fourth judgment); 169 Fed. Appx. 309 (fifth judgment), 349 (first and second judgments), and 352 (third judgment).

No. 05–11188. LAYNE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 05–11189. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–11191. CORRIETTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 171 Fed. Appx. 319.

No. 05–11193. BAD MARRIAGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 439 F. 3d 534.

No. 05–11194. LEWIS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 406 F. 3d 11.

No. 05–11195. LEONARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 439 F. 3d 648.

No. 05–11202. MEHIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 857.

No. 05–11206. BAKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 05–11208. BOULANGER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 05–11210. ROJERO VALLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 340.

No. 05–11214. RICHARDSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 893 A. 2d 590.

No. 05–11215. BANEGAS-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 321.

No. 05–11217. LYONS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 176 Fed. Appx. 69.

No. 05–11219. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–11224. RITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 171 Fed. Appx. 228.

No. 05–11225. GONZALES CHAVEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 311.

No. 05–11226. ROQUE-SANTIAGO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 05–11227. RODRIGUEZ-HERRERA *v.* UNITED STATES; and RODRIGUEZ-REYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 168 Fed. Appx. 664 (second judgment); 169 Fed. Appx. 339 (first judgment).

No. 05–11229. SALES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 162.

No. 05–11233. HARKREADER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 172 Fed. Appx. 688.

No. 05–11236. CARDENAS-RIOS *v.* UNITED STATES (Reported below: 169 Fed. Appx. 312); CHACON-AVITIA *v.* UNITED STATES (168 Fed. Appx. 659); FLORES-FLORES *v.* UNITED STATES (168 Fed. Appx. 661); GAMBOA-FLORES *v.* UNITED STATES (168 Fed. Appx. 671); GARCIA-GUERRERO *v.* UNITED STATES (168 Fed. Appx. 661); GONZALEZ-GARIBAY *v.* UNITED STATES (169 Fed. Appx. 321); HERNANDEZ-FUENTES *v.* UNITED STATES (169 Fed. Appx. 323); MARES-GARCIA *v.* UNITED STATES (169 Fed. Appx. 322); MARTINEZ VALDEZ *v.* UNITED STATES (168 Fed. Appx. 669); PAZ-MIRALDA *v.* UNITED STATES (169 Fed. Appx. 304); RAMOS-BARRIENTOS *v.* UNITED STATES (169 Fed. Appx. 319); RODRIGUEZ-GARCIA *v.* UNITED STATES (168 Fed. Appx. 662); ROSALES-ORTEGA *v.* UNITED STATES (169 Fed. Appx. 313); SALAS-OLIVAS *v.* UNITED STATES (169 Fed. Appx. 303); SALAS-SALAS *v.* UNITED STATES (169 Fed. Appx. 348); SANCHEZ-GALVAN *v.* UNITED STATES (169 Fed. Appx. 348); and ZUNIGA-PERALTA *v.* UNITED STATES (442 F. 3d 345). C. A. 5th Cir. Certiorari denied.

No. 05–11237. BROTHERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 438 F. 3d 1068.

No. 05–11238. ANDERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 438 F. 3d 823.

No. 05–11239. ANDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–11240. BERNI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 439 F. 3d 990.

No. 05–11244. MITCHELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 175 Fed. Appx. 524.

No. 05–11245. VENEGAS-MENDOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 168 Fed. Appx. 665.

No. 05–11248. MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 434 F. 3d 1318.

No. 05–11253. RAMOS-OSEGUERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 05–11254. RAMIREZ-VIRUETE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 169 Fed. Appx. 871.

No. 05–11256. ROY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 438 F. 3d 140.

No. 05–11272. TUCKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 172 Fed. Appx. 83.

No. 05–11274. CISNEROS-DE VERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 170 Fed. Appx. 314.

No. 05–273. FEDERAL TRADE COMMISSION *v.* SCHERING-PLOUGH CORP. ET AL. C. A. 11th Cir. Motions of Henry A. Waxman, National Association of Chain Drug Stores, Public Patent Foundation, Bayer Corporation, and AARP and Prescription Access Litigation Project for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of these motions and this petition. Reported below: 402 F. 3d 1056.

No. 05–1211. BOYKIN *v.* BANK OF AMERICA CORP., DBA BANK OF AMERICA, ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 162 Fed. Appx. 837.

No. 05–1231. GIPPETTI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 153 Fed. Appx. 865.

No. 05–1259. DASTAR CORP. *v.* RANDOM HOUSE, INC., ET AL. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 429 F. 3d 869.

No. 05–7955. SCZUBELEK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 402 F. 3d 175.

No. 05–11160. VAN VELZER *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL. C. A. 9th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 04–1611. NEBRASKA BEEF, LTD. *v.* GREENING ET AL., 547 U. S. 1110;

No. 04–1704. DAIMLERCHRYSLER CORP. ET AL. *v.* CUNO ET AL., 547 U. S. 332;

No. 04–1724. WILKINS, TAX COMMISSIONER FOR THE STATE OF OHIO, ET AL. *v.* CUNO ET AL., 547 U. S. 332;

No. 05–1057. IN RE OLSON, 547 U. S. 1068;

No. 05–1094. HORTON *v.* AHLER ET AL., 547 U. S. 1112;

No. 05–1104. TALLEY *v.* HOUSING AUTHORITY OF COLUMBUS, GEORGIA, 547 U. S. 1112;

No. 05–8973. RIGGINS *v.* TEXAS, 547 U. S. 1058;

No. 05–9020. CLEVELAND *v.* TEXAS, 547 U. S. 1073;

No. 05–9151. VISHEVNIK *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK, 547 U. S. 1076;

No. 05–9177. DUMAS *v.* UNITED STATES PAROLE COMMISSION ET AL., 547 U. S. 1077;

No. 05–9352. STANFORD *v.* SMITH, WARDEN, ET AL., 547 U. S. 1100;

No. 05–9585. MONTEJANO-QUINTANAR *v.* UNITED STATES, 547 U. S. 1062;

No. 05–9596. THOMPSON *v.* UNITED STATES, 547 U. S. 1082;

No. 05–9760. LAFRENIERE *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA, 547 U. S. 1117;

No. 05–9930. BORDERS *v.* UNITED STATES, 547 U. S. 1092;

No. 05–10137. WALKER *v.* UNITED STATES, 547 U. S. 1121;

No. 05–10217. IN RE SISNEROS, 547 U. S. 1110; and

No. 05–10275. IN RE FOGLE, 547 U. S. 1110. Petitions for rehearing denied.

No. 05–9496. KERRIGAN *v.* CHAO, SECRETARY OF LABOR, 547 U. S. 1093. Petition for rehearing denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

JUNE 27, 2006

Miscellaneous Orders

No. 05A1030. ALLEY *v.* KEY ET AL. Application for order requiring preservation of evidence, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

No. 05A1215. RESENDIZ *v.* TEXAS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

No. 05A1219. RESENDIZ *v.* LIVINGSTON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. Appli-

cation for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

No. 05A1220. RESENDIZ *v.* TEXAS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

Certiorari Denied

No. 05–1639 (05A1207). MAGALLON, INDIVIDUALLY AND AS NEXT FRIEND OF RESENDIZ *v.* LIVINGSTON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 453 F. 3d 268.

No. 05–10958 (05A1208). ALLEY *v.* KEY ET AL. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied.

No. 05–10959 (05A1209). ALLEY *v.* LITTLE, COMMISSIONER, TENNESSEE DEPARTMENT OF CORRECTIONS, ET AL. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 181 Fed. Appx. 509.

No. 05–10960 (05A1210). ALLEY *v.* BELL, WARDEN. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 178 Fed. Appx. 538.

No. 05–11686 (05A1206). RESENDIZ *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 452 F. 3d 356.

No. 05–11704 (05A1213). ALLEY *v.* LITTLE, COMMISSIONER, TENNESSEE DEPARTMENT OF CORRECTIONS, ET AL. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 186 Fed. Appx. 604.

No. 05–11710 (05A1214). RESENDIZ *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE BREYER would grant the application for stay of execution. Reported below: 454 F. 3d 456.

No. 05–11733 (05A1216). ALLEY *v.* TENNESSEE. Ct. Crim. App. Tenn. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied.

JUNE 28, 2006

Miscellaneous Orders

No. 05A1230. BELL, WARDEN *v.* MARTINIANO, NEXT FRIEND OF REID. Application to vacate the stay of execution of sentence of death entered by the United States District Court for the Middle District of Tennessee on June 27, 2006, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

No. 05–11734 (05A1221). IN RE ALLEY. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 05–11735 (05A1222). ALLEY *v.* BELL, WARDEN. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied.

JUNE 30, 2006

Affirmed on Appeal

No. 04–10649. HENDERSON *v.* PERRY, GOVERNOR OF TEXAS, ET AL.; and

No. 05–298. SOECHTING *v.* PERRY, GOVERNOR OF TEXAS, ET AL. Appeals from D. C. E. D. Tex. The Court affirmed in part, reversed in part, and vacated in part the judgment below in *League of United Latin American Citizens* v. *Perry*, *ante*, p. 399. Judgment affirmed with respect to the claims in these

cases. JUSTICE STEVENS and JUSTICE BREYER would reverse the judgment. Reported below: 399 F. Supp. 2d 756.

Appeal Dismissed

No. 05–460. LEE, UNITED STATES CONGRESSWOMAN, ET AL. *v.* PERRY, GOVERNOR OF TEXAS, ET AL. Appeal from D. C. E. D. Tex. dismissed. Reported below: 399 F. Supp. 2d 756.

Certiorari Granted—Vacated and Remanded

No. 05–294. NORTH CAROLINA *v.* SPEIGHT. Sup. Ct. N. C. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Washington* v. *Recuenco*, *ante*, p. 212. Reported below: 359 N. C. 602, 614 S. E. 2d 262.

No. 05–507. GARNER *v.* ASHLEY FURNITURE INDUSTRIES, INC. C. A. 5th Cir. Reported below: 141 Fed. Appx. 287;

No. 05–683. MCADAMS *v.* HARVEY. C. A. 11th Cir. Reported below: 141 Fed. Appx. 802;

No. 05–770. CAVICCHI *v.* CHERTOFF, SECRETARY OF HOMELAND SECURITY, ET AL. C. A. 11th Cir. Reported below: 154 Fed. Appx. 189;

No. 05–1233. JORDAN *v.* CHERTOFF, SECRETARY OF HOMELAND SECURITY. C. A. 7th Cir. Reported below: 160 Fed. Appx. 528; and

No. 05–1267. THOMAS *v.* POTTER, POSTMASTER GENERAL. C. A. 7th Cir. Reported below: 145 Fed. Appx. 182. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Burlington N. & S. F. R. Co.* v. *White*, *ante*, p. 53.

No. 05–660. WASHINGTON *v.* HALL. Sup. Ct. Wash. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Washington* v. *Recuenco*, *ante*, p. 212.

No. 05–6102. FORREST *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 359 N. C. 424, 611 S. E. 2d 833;

No. 05–7551. WRIGHT *v.* MINNESOTA. Sup. Ct. Minn. Reported below: 701 N. W. 2d 802;

No. 05–7998. BILLINGSLEA *v.* UNITED STATES. C. A. 11th Cir. Reported below: 144 Fed. Appx. 98;

No. 05–8778. WARSAME *v.* MINNESOTA. Ct. App. Minn. Reported below: 701 N. W. 2d 305;

No. 05–8785. ANDERSON *v.* ALASKA. Ct. App. Alaska. Reported below: 111 P. 3d 350;

No. 05–8875. LEWIS *v.* NORTH CAROLINA. Sup. Ct. N. C. Reported below: 360 N. C. 1, 619 S. E. 2d 830; and

No. 05–9233. THOMAS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Davis* v. *Washington*, 547 U. S. 813 (2006).

No. 05–10032. SCURLOCK-FERGUSON *v.* CITY OF DURHAM, NORTH CAROLINA. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Burlington N. & S. F. R. Co.* v. *White*, *ante*, p. 53. Reported below: 154 Fed. Appx. 390.

Miscellaneous Order

No. 05–790. IN RE HAMDAN. Petition for writ of habeas corpus denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

Certiorari Denied

No. 05–357. TEXAS *v.* LEE. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 143 S. W. 3d 565.

No. 05–672. MASSACHUSETTS *v.* RODRIGUEZ. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 45 Mass. 1003, 833 N. E. 2d 134.

No. 05–883. ROBERSON *v.* GAME STOP/BABBAGE'S. C. A. 5th Cir. Certiorari denied. Reported below: 152 Fed. Appx. 356.

No. 05–1027. GOLDRING, PARENT AND NEXT FRIEND OF ANDERSON, A MINOR *v.* DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 416 F. 3d 70.

No. 05–1049. WHITTAKER *v.* NORTHERN ILLINOIS UNIVERSITY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 424 F. 3d 640.

No. 05–1065. BREWER *v.* ENGLAND, SECRETARY OF THE NAVY. C. A. 4th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 590.

No. 05–1115. GRAHAM *v.* GONZALES, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 157 Fed. Appx. 139.

No. 05–1327. MOWBRAY *v.* AMERICAN GENERAL LIFE COS. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 162 Fed. Appx. 369.

No. 05–5304. RAMIREZ CARDENAS *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 405 F. 3d 244.

No. 05–5669. VIVERO-RENTERIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–5981. HEMBERTT *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 269 Neb. 840, 696 N. W. 2d 473.

No. 05–6025. MINOR *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 914 So. 2d 372.

No. 05–6093. LINDELL *v.* O'DONNELL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 135 Fed. Appx. 876.

No. 05–6336. JOHNSON *v.* MEADOWS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 418 F. 3d 1152.

No. 05–7157. MASSEY *v.* EVANS, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 05–7502. QUINTERO *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 05–7630. FEUER *v.* MCCOLLUM ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 139 Fed. Appx. 928.

No. 05–8038. MARTINEZ AUGUSTINE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 359 N. C. 709, 616 S. E. 2d 515.

No. 05–8144. VALENCIA MICHILENO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 05–8187. GREENE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 274 Conn. 134, 874 A. 2d 750.

No. 05–8236. JOHNSON *v.* MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 145 Fed. Appx. 827.

No. 05–8306. MARKOVIC *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 285 Wis. 2d 805, 701 N. W. 2d 652.

No. 05–8398. RUSSEAU *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 171 S. W. 3d 871.

No. 05–8439. STEFFLER *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 200 Ore. App. 291, 114 P. 3d 1157.

No. 05–8485. GONSALVES *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 445 Mass. 1, 833 N. E. 2d 549.

No. 05–8520. SORTO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 173 S. W. 3d 469.

No. 05–8766. BRITO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 427 F. 3d 53.

No. 05–8964. DENNIS *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 05–9280. CHAVEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 151 Fed. Appx. 302.

No. 05–9835. CALHOUN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 932 So. 2d 923.

No. 04–1579. LABORATORY CORPORATION OF AMERICA HOLDINGS, DBA LABCORP *v.* METABOLITE LABORATORIES, INC., ET AL. C. A. Fed. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 121 Fed. Appx. 396.

No. 05–674. MASSACHUSETTS *v.* GONSALVES. Sup. Jud. Ct. Mass. Motion of respondent for leave to proceed *in forma pau-*

peris granted. Certiorari denied. Reported below: 445 Mass. 1, 833 N. E. 2d 549.

No. 05–769. MASSACHUSETTS *v.* FOLEY. Sup. Jud. Ct. Mass. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 445 Mass. 1001, 833 N. E. 2d 130.

No. 05–856. TEXAS *v.* RUSSEAU. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 171 S. W. 3d 871.

No. 05–1180. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* MOORMANN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 426 F. 3d 1044.

JULY 5, 2006

Miscellaneous Order

No. 06A7. NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. *v.* DAVIS. Application to vacate the stay of execution of sentence of death entered by the United States District Court for the Eastern District of Arkansas on June 26, 2006, presented to JUSTICE ALITO, and by him referred to the Court, denied.

JULY 11, 2006

Miscellaneous Order

No. 06A36 (06–5147). WILCHER *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending the disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of the Court. THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE ALITO would deny the application for stay of execution.

Certiorari Denied

No. 06–5093 (06A29). O'BRIEN *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented

to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 190 S. W. 3d 677.

JULY 13, 2006

Dismissal Under Rule 46

No. 05–10622. ATUAR, AKA ROZEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 156 Fed. Appx. 555.

JULY 19, 2006

Miscellaneous Order

No. 06–5355 (06A69). IN RE BROWN. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 06–5356 (06A70). BROWN *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

No. 06–5357 (06A71). BROWN *v.* LIVINGSTON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 457 F. 3d 390.

JULY 20, 2006

Certiorari Denied

No. 06–5072 (06A17). HEDRICK *v.* KELLY, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 443 F. 3d 342.

JULY 27, 2006

Certiorari Denied

No. 06–5331 (06A64). LENZ *v.* KELLY, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented

to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 444 F. 3d 295.

JULY 31, 2006

Miscellaneous Orders

No. D–2427. IN RE DISCIPLINE OF TELESFORD. Cyrena Ann Telesford, of Brooklyn, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2428. IN RE DISCIPLINE OF TARTAGLIA. John Anthony Tartaglia, of Bedford, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2429. IN RE DISCIPLINE OF STALL. Todd Simon Stall, of Poughkeepsie, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2430. IN RE DISCIPLINE OF KESSLER. Stuart W. Kessler, of Key West, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2431. IN RE DISCIPLINE OF MITCHELL. Wilhemena Lawrence Mitchell, of Englewood, Colo., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2432. IN RE DISCIPLINE OF ROTHENBERG. Steven G. Rothenberg, of Kingston, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2433. IN RE DISCIPLINE OF BOYAR. Daniel Martin Boyar, of Dunellon, Fla., is suspended from the practice of law in

this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2434. IN RE DISCIPLINE OF BARRETT. David A. Barrett, of Tallahassee, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2435. IN RE DISCIPLINE OF KNICKMEIER. Jeffrey David Knickmeier, of McFarland, Wis., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2436. IN RE DISCIPLINE OF TRUONG. Mac Truong, of New York, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2437. IN RE DISCIPLINE OF REICH. Edward Stuart Reich, of Otisville, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2438. IN RE DISCIPLINE OF FULLER. Clifton S. Fuller, Jr., of Atlanta, Ga., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Rehearing Denied

No. 05–1002. SHAW *v.* SAN DIEGO COUNTY, CALIFORNIA, 547 U. S. 1070;

No. 05–1166. ALLY *v.* GRAVER ET AL., 547 U. S. 1130;

No. 05–1504. EDWARDS ET AL. *v.* UNITED STATES, *ante*, p. 908;

No. 05–7919. JAAKKOLA *v.* GOTHAM ET AL., 546 U. S. 1181;

No. 05–8856. DIXON *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, 547 U. S. 1027;

No. 05–9396. SHERMAN *v.* RYAN, ACTING WARDEN, 547 U. S. 1101;

No. 05–9397. REDFORD *v.* HAMIL, JUDGE, SUPERIOR COURT OF GEORGIA, GWINNETT JUDICIAL CIRCUIT, 547 U. S. 1114;

No. 05–9441. STRAMAGLIA *v.* FAMILY INDEPENDENCE AGENCY, 547 U. S. 1115;

No. 05–9446. BUNCH *v.* NORTH CAROLINA DEPARTMENT OF CORRECTION ET AL., 547 U. S. 1115;

No. 05–9480. WILSON *v.* NICHOLSON, SECRETARY OF VETERANS AFFAIRS, 547 U. S. 1101;

No. 05–9552. MICHAEL *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 547 U. S. 1133;

No. 05–9559. FOX *v.* YUKINS, WARDEN, ET AL., 547 U. S. 1133;

No. 05–9572. STRAHAN *v.* MICHIGAN, 547 U. S. 1116;

No. 05–9606. SALAR *v.* CITY OF MESA POLICE DEPARTMENT ET AL., 547 U. S. 1133;

No. 05–9615. PICKETT *v.* MCCLINTOCK, DEPUTY FEDERAL DEFENDER, 547 U. S. 1134;

No. 05–9626. THORPE *v.* OHIO, 547 U. S. 1134;

No. 05–9643. BAKER *v.* COTO ET AL., 547 U. S. 1134;

No. 05–9680. LANE-EL *v.* KNIGHT, 547 U. S. 1135;

No. 05–9734. GREENE *v.* FINGER LAKES DEVELOPMENTAL DISABILITIES OFFICE ET AL., 547 U. S. 1136;

No. 05–9772. CLARK *v.* UNITED STATES, 547 U. S. 1088;

No. 05–9884. KANDEKORE *v.* FLORIDA BAR, 547 U. S. 1152;

No. 05–9894. TALBOTT *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL., 547 U. S. 1152;

No. 05–9940. GLENN *v.* SABA, 547 U. S. 1165;

No. 05–9990. IN RE FOOSE, 547 U. S. 1162;

No. 05–9995. GAFFNEY *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 547 U. S. 1166;

No. 05–10001. HANN *v.* STATE TREASURER, 547 U. S. 1153;

No. 05–10033. HARRINGTON *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES ET AL., 547 U. S. 1167;

No. 05–10034. HAYNES *v.* FLORIDA, 547 U. S. 1138;

No. 05–10050. IN RE BOWELL, 547 U. S. 1162;

No. 05–10060. POINDEXTER *v.* COMMISSIONER OF INTERNAL REVENUE, 547 U. S. 1138;

No. 05–10126. REEVES *v.* ST. MARY'S COUNTY COMMISSIONERS ET AL., 547 U. S. 1167;

No. 05–10131. MOORE *v.* EGAN ET AL., 547 U. S. 1167;

No. 05–10194. KENNEDY *v.* SMITH ET AL., 547 U. S. 1154;

No. 05–10197. WARMUS *v.* UNITED STATES, 547 U. S. 1122;

No. 05–10218. WEST *v.* STOUFFER, WARDEN, ET AL., 547 U. S. 1154;

No. 05–10219. VOHRA *v.* ORANGE COUNTY, CALIFORNIA, ET AL., 547 U. S. 1182;

No. 05–10241. MESINA *v.* UNITED STATES, 547 U. S. 1139;

No. 05–10276. IN RE HAMMOND, 547 U. S. 1126;

No. 05–10298. JONES *v.* UNITED STATES, 547 U. S. 1140;

No. 05–10310. IN RE MITCHELL, 547 U. S. 1126;

No. 05–10321. HOWARD *v.* KOZAK ET AL., 547 U. S. 1208;

No. 05–10336. WILLIAMS *v.* UNITED STATES, 547 U. S. 1141;

No. 05–10337. ACKERMAN *v.* ASSURANT, INC., FKA FORTIS, INC., ET AL., 547 U. S. 1168;

No. 05–10417. FADLALLAH *v.* DEARBORN PUBLIC SCHOOLS, 547 U. S. 1210;

No. 05–10421. HAIRSTON *v.* UNITED STATES, 547 U. S. 1143;

No. 05–10568. BUSTILLO *v.* HOOD, WARDEN, 547 U. S. 1159;

No. 05–10578. HUMPHREY *v.* UNITED STATES, 547 U. S. 1169; and

No. 05–10918. IN RE GUINN, 547 U. S. 1177. Petitions for rehearing denied.

No. 05–348. COMFORT, ON BEHALF OF HER MINOR CHILD NEUMYER, ET AL. *v.* LYNN SCHOOL COMMITTEE ET AL., 546 U. S. 1061;

No. 05–5957. KANDEKORE *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, 546 U. S. 982; and

No. 05–8413. MANESS *v.* UNITED STATES, 546 U. S. 1196. Motions for leave to file petitions for rehearing denied.

AUGUST 3, 2006

Certiorari Denied

No. 05–11297 (05A1204). WYATT *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 165 Fed. Appx. 335.

AUGUST 16, 2006

Miscellaneous Order

No. 06–5874 (06A171). IN RE HINOJOSA. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

AUGUST 17, 2006

Certiorari Denied

No. 06–5945 (06A191). FLIPPEN *v.* BECK, SECRETARY, NORTH CAROLINA DEPARTMENT OF CORRECTION, ET AL. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

AUGUST 18, 2006

Dismissal Under Rule 46

No. 06–5196. DAVIS *v.* DINOME ET AL. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 180 Fed. Appx. 478.

Certiorari Denied

No. 06–5865 (06A197). FLIPPEN *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Forsyth County, N. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

AUGUST 21, 2006

Miscellaneous Orders

No. 05A1162. SWEATMON *v.* JONES ET AL. Ct. Sp. App. Md. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. 06A11. IN RE MARTIN. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. 06A19. MORRIS *v.* MORRIS. Sup. Ct. Fla. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. 06A79. S. A. STOLT-NIELSEN ET AL. *v.* UNITED STATES. C. A. 3d Cir. Application to recall and stay the mandate, addressed to JUSTICE STEVENS and referred to the Court, denied. JUSTICE ALITO took no part in the consideration or decision of this application.

No. D–2439. IN RE DISCIPLINE OF MORALES. Daniel C. Morales, of Austin, Tex., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2440. IN RE DISCIPLINE OF ANKERMAN. William Lewis Ankerman, of West Hartford, Conn., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Rehearing Denied

No. 05–1065. BREWER *v.* ENGLAND, SECRETARY OF THE NAVY, *ante*, p. 925;

No. 05–1168. TEXAS STATE BANK *v.* UNITED STATES, 547 U. S. 1206;

No. 05–1223. SINGH *v.* U. S. SECURITY ASSOCIATES, INC., *ante*, p. 904;

No. 05–1232. INSTA-MIX, INC., ET AL. *v.* LUV N' CARE, LTD., *ante*, p. 904;

No. 05–1310. ELSO *v.* UNITED STATES, 547 U. S. 1131;

No. 05–1511. BATIE *v.* UNITED STATES, *ante*, p. 908;

No. 05–5810. BOSLEY *v.* CAIN, WARDEN, 547 U. S. 1208;

No. 05–8556. SILVA *v.* UNITED STATES, 547 U. S. 1164;

No. 05–9166. SCOTT *v.* ROMERO, WARDEN, ET AL., 547 U. S. 1077;

No. 05–9265. MASON *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, 547 U. S. 1079;

No. 05–9353. RANDALL *v.* BEHRNS ET AL., 547 U. S. 1100;

No. 05–9377. RANDOLPH *v.* TATAROW FAMILY PARTNERS, LTD., ET AL., 547 U. S. 1100;

No. 05–9405. PAIGE *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 547 U. S. 1114;

No. 05–9601. BREEDLOVE *v.* SIRMONS, WARDEN, 547 U. S. 1133;

No. 05–9740. RANDOLPH *v.* FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS, 547 U. S. 1136;

No. 05–9747. WHITE *v.* MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 547 U. S. 1150;

No. 05–9869. HENDERSON *v.* MINNESOTA, 547 U. S. 1160;

No. 05–9932. FAUNTLEROY *v.* VIRGINIA, 547 U. S. 1137;

No. 05–9939. HILL *v.* UNITED STATES, 547 U. S. 1103;

No. 05–9961. HART *v.* FITZPATRICK, 547 U. S. 1165;

No. 05–9966. HINTZ *v.* UNITED STATES, 547 U. S. 1104;

No. 05–10000. HUBEL *v.* NEW YORK, 547 U. S. 1166;

No. 05–10106. WILCOX *v.* MORGAN, WARDEN, 547 U. S. 1181;

No. 05–10117. RUSH *v.* KANSAS, 547 U. S. 1154;

No. 05–10159. AULTMAN *v.* NORTH CAROLINA, 547 U. S. 1154;

No. 05–10161. LANCASTER *v.* TEXAS, 547 U. S. 1182;

No. 05–10213. COOLEY *v.* ALABAMA DEPARTMENT OF MENTAL HEALTH, 547 U. S. 1182;

No. 05–10267. TURNER *v.* DONNELLY ET AL., 547 U. S. 1168;

No. 05–10269. WOODARD *v.* MISSISSIPPI, 547 U. S. 1195;

No. 05–10294. ENCALADE *v.* WAKEFIELD ET AL., 547 U. S. 1195;

No. 05–10303. CHISUM *v.* KELLEY ET AL., 547 U. S. 1195;

No. 05–10306. AUBUCHONT *v.* CATTELL, WARDEN, 547 U. S. 1195;

No. 05–10333. JORGENSEN *v.* SONY MUSIC ENTERTAINMENT ET AL., 547 U. S. 1154;

No. 05–10343. COLEMAN *v.* ARIZONA, 547 U. S. 1209;

No. 05–10390. SMITH *v.* DEPARTMENT OF THE TREASURY, 547 U. S. 1155;

No. 05–10452. GLASS *v.* UNDERWOOD, 547 U. S. 1211;

No. 05–10521. NELSON *v.* WONG ET AL., *ante*, p. 910;

No. 05–10534. WAKEFIELD *v.* CITY OF MIAMI-DADE, FLORIDA, *ante*, p. 910;

No. 05–10538. METZSCH *v.* AVAYA, INC., *ante*, p. 910;

No. 05–10705. PERRY *v.* UNITED STATES, 547 U. S. 1174;

No. 05–10713. BURNETTE *v.* UNITED STATES, 547 U. S. 1184;

No. 05–10751. EATMON *v.* B. D. MORGAN, INC., ET AL., 547 U. S. 1185;

No. 05–10792. BROWNING *v.* BI-LO, INC., *ante*, p. 912;

No. 05–10840. BENNETT *v.* UNITED STATES, 547 U. S. 1198;

No. 05–10845. WEST *v.* UNITED STATES, 547 U. S. 1198;

No. 05–10867. CHEN *v.* BRANCH BANKING & TRUST CO., *ante*, p. 913;

No. 05–10989. TRIPLETT *v.* UNITED STATES, 547 U. S. 1215;

No. 05–11017. RYAN-WEBSTER *v.* UNITED STATES, 547 U. S. 1215;

No. 05–11088. WENGER *v.* UNITED STATES, *ante*, p. 913; and

No. 05–11160. VAN VELZER *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL., *ante*, p. 919. Petitions for rehearing denied.

No. 05–10490. NUNEZ *v.* FLORIDA, 547 U. S. 1196. Motion for leave to file petition for rehearing denied.

AUGUST 24, 2006

Certiorari Denied

No. 05–11440 (05A1151). FULLER *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 161 Fed. Appx. 413.

AUGUST 28, 2006

Miscellaneous Order

No. 06A179. LEEGIN CREATIVE LEATHER PRODUCTS *v.* PSKS, INC., DBA KAY'S KLOSET . . . KAY'S SHOES, ET AL. Application to recall and stay the mandate of the United States Court of Appeals for the Fifth Circuit, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending the timely filing and disposition of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the judgment of this Court. This order is conditioned upon the remaining in effect of the bond posted in the United States District Court for the Eastern District of Texas.

AUGUST 29, 2006

Certiorari Denied

No. 06–6151 (06A232). PATTON *v.* JONES, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir.

Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Certiorari denied. Reported below: 193 Fed. Appx. 785.

AUGUST 31, 2006

Miscellaneous Order

No. 06–6234 (06A245). IN RE FRAZIER. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 06–6043 (06A208). FRAZIER *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 206 S. W. 3d 666.

No. 06–6231 (06A244). FRAZIER *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 1, 2006

Miscellaneous Orders

No. 05A1143. RODRIGUEZ *v.* PEREIRA ET AL. C. A. 4th Cir. Application to recall and stay the mandate, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. 05A1202. OSTOPOSIDES ET AL. *v.* GLIMP ET AL. Ct. App. Cal., 2d App. Dist. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 06A20. ROBERTS *v.* WMC MORTGAGE CORP. ET AL. C. A. 9th Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–2428. IN RE TARTAGLIA. John Anthony Tartaglia, of Bedford, N. Y., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys permitted to the practice of law before

this Court. The rule to show cause, issued on July 31, 2006 [*ante*, p. 929], is discharged.

No. D–2429. IN RE STALL. Todd Simon Stall, of Poughkeepsie, N. Y., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys permitted to the practice of law before this Court. The rule to show cause, issued on July 31, 2006 [*ante*, p. 929], is discharged.

No. 04–1350. KSR INTERNATIONAL CO. *v.* TELEFLEX INC. ET AL. C. A. Fed. Cir. [Certiorari granted, *ante*, p. 902.] Motion of Joseph V. Colaianni, Sr., and James E. Armstrong III for leave to file a brief as *amici curiae* granted.

No. 05–380. GONZALES, ATTORNEY GENERAL *v.* CARHART ET AL. C. A. 8th Cir. [Certiorari granted, 546 U. S. 1169.] Motion of Alan Ernest to allow counsel, or guardian ad litem, to represent children unborn and born alive denied. Motion of Legal Defense for Unborn Children for leave to file a brief as *amicus curiae* denied.

No. 05–547. LOPEZ *v.* GONZALES, ATTORNEY GENERAL. C. A. 8th Cir.; and

No. 05–7664. TOLEDO-FLORES *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 547 U. S. 1054.] Joint motion of petitioners for divided argument granted.

No. 05–608. MEDIMMUNE, INC. *v.* GENENTECH, INC., ET AL. C. A. Fed. Cir. [Certiorari granted, 546 U. S. 1169.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 05–705. GLOBAL CROSSING TELECOMMUNICATIONS, INC. *v.* METROPHONES TELECOMMUNICATIONS, INC. C. A. 9th Cir. [Certiorari granted, 546 U. S. 1169.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 05–746. NORFOLK SOUTHERN RAILWAY CO. *v.* SORRELL. Ct. App. Mo., Eastern Dist. [Certiorari granted, 547 U. S. 1127.] Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted.

No. 05–915. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF MCDONALD *v.* JEFFERSON COUNTY BOARD OF EDUCA-

TION ET AL. C. A. 6th Cir. [Certiorari granted, 547 U. S. 1178.] Motion of petitioner for leave to proceed further herein *in forma pauperis* granted.

No. 05–1382. GONZALES, ATTORNEY GENERAL *v.* PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., ET AL. C. A. 9th Cir. [Certiorari granted, 547 U. S. 1205.] Motion of Alan Ernest to allow counsel, or guardian ad litem, to represent children unborn and born alive denied.

Rehearing Denied

No. 05–1339. HAAN *v.* COX, ATTORNEY GENERAL OF MICHIGAN, ET AL., *ante*, p. 905;

No. 05–9197. JOHNSON *v.* GRACE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL., 547 U. S. 1077;

No. 05–9829. PAYNE *v.* BELL, WARDEN, *ante*, p. 908;

No. 05–10472. WILLIAMS *v.* IBERIA PARISH SHERIFF'S DEPARTMENT ET AL.; and WILLIAMS *v.* PFIZER INC. ET AL., *ante*, p. 909;

No. 05–11156. BADRUDDOZZA *v.* UNITED STATES, *ante*, p. 915; and

No. 05–11208. BOULANGER *v.* UNITED STATES, *ante*, p. 917. Petitions for rehearing denied.

No. 05–9883. KANIADAKIS *v.* UNITED STATES, 547 U. S. 1091. Motion for leave to file petition for rehearing denied.

No. 05–10768. SMITH *v.* UNITED STATES, 547 U. S. 1188. Petition for rehearing denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

SEPTEMBER 5, 2006

Dismissals Under Rule 46

No. 06–5044. CHING TANG LO *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 447 F. 3d 1212.

No. 06–5160. STORK *v.* GILCHRIST. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 444 F. 3d 237.

SEPTEMBER 12, 2006

Miscellaneous Order

No. 06–6390 (06A279). IN RE MATCHETT. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 06–6389 (06A278). MATCHETT *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

SEPTEMBER 13, 2006

Dismissal Under Rule 46

No. 05–1111. CLARK ET AL. *v.* WYETH. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 431 F. 3d 141.

SEPTEMBER 18, 2006

Miscellaneous Order

No. 06A302. BELL, WARDEN *v.* HOLTON. Application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Sixth Circuit on September 18, 2006, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

SEPTEMBER 19, 2006

Dismissal Under Rule 46

No. 06–98. WIEN & MALKIN LLP ET AL. *v.* HELMSLEY-SPEAR, INC. Ct. App. N. Y. Certiorari dismissed under this Court's Rule 46.1. Reported below: 6 N. Y. 3d 471, 846 N. E. 2d 1201.

SEPTEMBER 20, 2006

Miscellaneous Order

No. 06A301 (06–6545). HILL *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th

Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of execution.

SEPTEMBER 22, 2006

Dismissals Under Rule 46

No. 05–1426. COLOMBO SAVINGS BANK, F. S. B. *v.* HEIKO. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 434 F. 3d 249.

No. 05–1433. MACKEY ET AL. *v.* COMPASS MARKETING, INC. Ct. App. Md. Certiorari dismissed under this Court's Rule 46.1. Reported below: 391 Md. 117, 892 A. 2d 479.

SEPTEMBER 26, 2006

Certiorari Granted

No. 05–1345. UNITED HAULERS ASSN., INC., ET AL. *v.* ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 261 F. 3d 245 and 438 F. 3d 150.

No. 05–1508. ZUNI PUBLIC SCHOOL DISTRICT NO. 89 ET AL. *v.* DEPARTMENT OF EDUCATION ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 437 F. 3d 1289.

No. 05–1575. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* LANDRIGAN, AKA HILL. C. A. 9th Cir. Certiorari granted. Reported below: 441 F. 3d 638.

No. 05–1272. ROCKWELL INTERNATIONAL CORP. ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari granted limited to Question 1 presented by the petition. Petitioners' brief to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, October 26, 2006. Respondents' brief to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 20, 2006. The reply brief, if any, to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 27, 2006. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 92 Fed. Appx. 708.

No. 05–1589. DAVENPORT ET AL. *v.* WASHINGTON EDUCATION ASSN.; and

No. 05–1657. WASHINGTON *v.* WASHINGTON EDUCATION ASSN. Sup. Ct. Wash. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: 156 Wash. 2d 543, 130 P. 3d 352.

No. 05–1629. GONZALES, ATTORNEY GENERAL *v.* DUENAS-ALVAREZ. C. A. 9th Cir. Certiorari granted. Petitioner's brief to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, October 26, 2006. Respondent's brief to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 20, 2006. The reply brief, if any, to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 27, 2006. Reported below: 176 Fed. Appx. 820.

No. 06–102. SINOCHEM INTERNATIONAL CO. LTD. *v.* MALAYSIA INTERNATIONAL SHIPPING CORP. C. A. 3d Cir. Certiorari granted. Reported below: 436 F. 3d 349.

No. 06–84. SAFECO INSURANCE COMPANY OF AMERICA ET AL. *v.* BURR ET AL.; and

No. 06–100. GEICO GENERAL INSURANCE CO. ET AL. *v.* EDO. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour is allotted for oral argument. Reported below: No. 06–100, 435 F. 3d 1081; No. 06–84, 140 Fed. Appx. 746.

No. 06–116. MOYLAN, ATTORNEY GENERAL OF GUAM *v.* CAMACHO, GOVERNOR OF GUAM. Sup. Ct. Guam. Certiorari granted. In addition to the question presented by the petition for writ of certiorari, the parties are directed to brief and argue the following question: "Whether the time for filing a petition for writ of certiorari from this Court was tolled while a petition for writ of certiorari or writ of certiorari with respect to the same judgment was pending before the United States Court of Appeals for the Ninth Circuit."

SEPTEMBER 28, 2006

Dismissal Under Rule 46

No. 06–6348. STEPHENS *v.* WYNNE, SECRETARY OF THE AIR FORCE. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 46.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 942 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

SAN DIEGANS FOR THE MT. SOLEDAD NATIONAL WAR MEMORIAL *v.* PAULSON

ON APPLICATION FOR STAY

No. 05A1233. Decided July 7, 2006*

San Diego's application for a stay pending expedited appeal of the District Court's order to comply with an earlier injunction, affirmed on appeal, barring the city from maintaining a prominent Latin cross at a veterans' memorial on city property is granted; but proposed intervenor's stay application is denied as moot. In No. 05A1234, the equities support preserving the status quo while the city's appeal proceeds. Compared to the irreparable harm of altering the memorial and removing the cross, the harm in a brief delay pending the Ninth Circuit's expedited consideration seems slight. Two other factors make this case "sufficiently unusual," *Heckler* v. *Redbud Hospital Dist.*, 473 U. S. 1308, 1312 (O'Connor, J., in chambers), to justify a stay. First, because a recent Act of Congress deeming the monument a national memorial and authorizing the Secretary of the Interior to take title if the city offers to donate it postdates the Ninth Circuit's previous decisions, its effect on the litigation has yet to be considered. Second, San Diego voters have approved a ballot proposition authorizing that donation. A state court has declared the proposition invalid, but if the California appellate court reverses, allowing the memorial to become federal property, its decision may moot the District Court's injunction. And the state appellate court's decision may provide important guidance regarding state-law issues pertinent to the federal court's injunction and the recent federal statute's effect. Separate consideration of the application in No. 05A1233 is unnecessary, since applicant was denied leave to intervene in the District Court and in all events seeks no relief beyond the stay granted in No. 05A1234.

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*Together with No. 05A1234, *City of San Diego* v. *Paulson*, also on application for stay.

JUSTICE KENNEDY, Circuit Justice.

In this longrunning federal-court litigation the United States District Court for the Southern District of California has ordered that, within 90 days of May 3, 2006, the city of San Diego, California, must comply with an earlier injunction, affirmed on appeal, that barred the city from maintaining a prominent Latin cross at a veterans' memorial on city property. The premise of the injunction was that the cross' permanent presence there violates the California State Constitution. See *Murphy* v. *Bilbray*, 782 F. Supp. 1420, 1426–1427, 1438 (SD Cal. 1991), aff'd, *Ellis* v. *La Mesa*, 990 F. 2d 1518, 1520 (CA9 1993), cert. denied *sub nom. San Diego* v. *Paulson*, 513 U. S. 925 (1994); see also *Paulson* v. *San Diego*, 294 F. 3d 1124, 1133, and n. 7 (CA9 2002) (en banc) (holding that a proposed sale of the memorial violated the State Constitution), cert. denied, 538 U. S. 978 (2003). The city has appealed from the District Court's order to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals has ordered expedited briefing and scheduled oral argument for the week of October 16, 2006; it denied, however, a motion to stay the District Court's order pending appeal. In No. 05A1234, the city of San Diego has applied to me, as Circuit Justice, for a stay pending appeal. In No. 05A1233, the San Diegans for the Mt. Soledad National War Memorial, a proposed intervenor in the case, likewise applies for a stay. On July 3, 2006, I issued a temporary stay pending further order. I now grant the city's application, while denying the proposed intervenor's application as moot.

In considering stay applications on matters pending before the Court of Appeals, a Circuit Justice must "try to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.'" *INS* v. *Legalization Assistance Project of Los Angeles County Federation of Labor*, 510 U. S. 1301, 1304 (1993)

(O'Connor, J., in chambers); see also, *e. g.*, *Heckler* v. *Redbud Hospital Dist.*, 473 U. S. 1308, 1311–1312 (1985) (Rehnquist, J., in chambers). "This is always a difficult and speculative inquiry." *Legalization Assistance Project*, *supra*, at 1304. Although "a stay application to a Circuit Justice on a matter before a court of appeals is rarely granted," *Heckler*, 473 U. S., at 1312 (internal quotation marks omitted), consideration of the relevant factors leads me to conclude that a stay is appropriate in this case.

To begin with, the equities here support preserving the status quo while the city's appeal proceeds. Compared to the irreparable harm of altering the memorial and removing the cross, the harm in a brief delay pending the Court of Appeals' expedited consideration of the case seems slight. In addition, two further factors make this case "sufficiently unusual," *ibid.*, to warrant granting a stay. First, a recent Act of Congress has deemed the monument a "national memorial honoring veterans of the United States Armed Forces" and has authorized the Secretary of the Interior to take title to the memorial on behalf of the United States if the city offers to donate it. § 116, 118 Stat. 3346. Because this legislation postdates the Court of Appeals' previous decisions in this case, its effect on the litigation has yet to be considered. Second, San Diego voters, seeking to carry out the transfer contemplated by the federal statute, have approved a ballot proposition authorizing donation of the monument to the United States. While the Superior Court of California for the County of San Diego has invalidated the ballot proposition on the grounds that the proposed transfer would violate the California Constitution, *Paulson* v. *Abdelnour*, No. GIC–849667 (Oct. 7, 2005), p. 35, the California Court of Appeal for the Fourth Appellate District has issued an order expediting the city's appeal of the Superior Court decision, see *Paulson* v. *Abdelnour*, No. D047702 (June 20, 2006).

If the state appellate court reverses the Superior Court and allows the memorial to become federal property, its deci-

sion may moot the District Court's injunction, which addresses only the legality under state law of the cross' presence on city property, see *Murphy*, *supra*, at 1438. This parallel state-court litigation, furthermore, may present an opportunity for California courts to address state-law issues pertinent to the District Court's injunction. The state appellate court's decision may provide important guidance regarding those issues and the effect, if any, of the recent federal statute.

Although the Court denied certiorari in this litigation at earlier stages, Congress' evident desire to preserve the memorial makes it substantially more likely that four Justices will agree to review the case in the event the Court of Appeals affirms the District Court's order. The previously unaddressed issues created by the federal statute, moreover, reinforce the equities supporting a stay; and the pendency of state-court litigation that may clarify the state-law basis for the District Court's order further supports preserving the status quo. Accordingly, although the Court, and individual Circuit Justices, should be most reluctant to disturb interim actions of the Court of Appeals in cases pending before it, the respect due both to Congress and to the parallel state-court proceedings persuades me that the District Court's order in this case should be stayed pending final disposition of the appeal by the United States Court of Appeals for the Ninth Circuit or until further order of this Court. If circumstances change significantly, the parties may apply to this Court for reconsideration.

For these reasons, the application in No. 05A1234 is hereby granted. The proposed intervenor San Diegans for the Mt. Soledad National War Memorial was denied leave to intervene in the District Court and in all events seeks no relief beyond the stay granted in No. 05A1234. Separate consideration of the application in No. 05A1233 thus is unnecessary and this application hereby is denied.

It is so ordered.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 2003, 2004, AND 2005

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	2003	**2004**	**2005**	**2003**	**2004**	**2005**	**2003**	**2004**	**2005**	**2003**	**2004**	**2005**
Number of cases on dockets	6	4	8	2,058	2,041	2,025	6,818	6,543	7,575	8,882	8,588	9,608
Number disposed of during term	2	0	4	1,758	1,687	1,679	6,030	5,814	6,526	7,790	7,501	8,209
Number remaining on dockets	4	4	4	300	354	346	788	729	1049	1,092	1,087	1,399

	TERMS		
	2003	**2004**	**2005**
Cases argued during term	[1] 91	87	[2] 90
Number disposed of by full opinions	[1] 89	85	82
Number disposed of by per curiam opinions	2	2	5
Number set for reargument	0	0	3
Cases granted review this term	87	80	78
Cases reviewed and decided without oral argument	52	826	105
Total cases to be available for argument at outset of following term	47	41	31

[1] Includes 02–1674, 02–1675, 02–1676, 02–1702, 02–1727, 02–1733, 02–1734, 02–1740, 02–1747, 02–1753, 02–1755, 02–1756 argued September 8, 2003.

[2] Includes three cases reargued 04–473, 04–1170, 04–1360.

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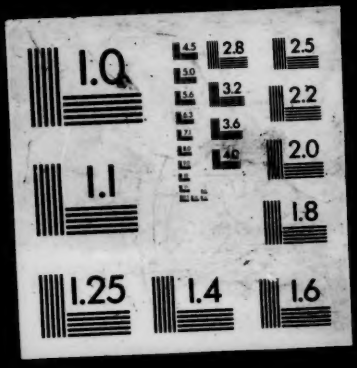
WORDS AND PHRASES.

"Award reasonable attorneys' fees as part of the costs." Individuals with Disabilities Act, 20 U. S. C. § 1415(i)(3)(B). Arlington Central School Dist. Bd. of Ed. v. Murphy, p. 291.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